

DRAFT TERM SHEET

PRESIDIO PARKWAY PROJECT

TERM SHEET

This Term Sheet uses certain terms that are capitalized. For a full definition of these terms, please see Appendix 1 of the draft agreement.

Term	Provision
Scope	
Project Scope	See Exhibit A, Section 1.
Contract Documents	
Contract Documents	<p>The comprehensive development lease agreement will be a set of integrated contract documents (“Contract Documents”) that will include:</p> <ul style="list-style-type: none"> • A public-private agreement (“Agreement”) setting forth legal and business terms for design, construction, financing, operation, maintenance and related matters, a draft of which is part of Attachment 4; • A project lease (“Lease”), signed concurrently with the public-private agreement, a draft of which is part of Attachment 4; and • Technical specifications (“Technical Requirements”), setting forth design, construction, operations and maintenance technical standards, requirements, terms and conditions..
Term and Milestones	
Agreement Term	The term of the Agreement shall commence on the effective date of the Agreement. The term of the Lease will commence upon Substantial Completion. The term of the Agreement and Lease will end the earlier of (a) [33] years after the effective date of the Agreement, or (b) any earlier termination as provided in the Agreement.
Completion Milestones/Dates	Substantial Completion means the project is complete except for certain improvements and punch list items, and open to traffic. The Substantial Completion Date sets the date for Substantial Completion of the Project. Substantial Completion shall occur no later than the Long Stop Date. Long Stop Date means a date beyond the Substantial Completion Date to be

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	<p>set forth in the Contract Documents.</p> <p>Developer will be required to achieve Final Acceptance within a set time after Substantial Completion. Final Acceptance requires completion of all improvements and punch list items.</p> <p>The right to Availability Payments will begin either on Substantial Completion or Final Acceptance, but in no event may Availability Payments commence earlier than the Early Completion Date. Early Completion Date means a date before the Substantial Completion Date or Final Acceptance Date to be set forth in the Contract Documents.</p> <p>Department will assess liquidated damages for failure to meet the deadline for Final Acceptance, in amounts to be determined. Failure to achieve Substantial Completion by the Long Stop Date may result in termination, in Department's sole discretion.</p>
Project Planning, Review and Oversight	
Project Management Plan	<p>Developer to prepare a project management plan that will set forth Developer's approach to development, design, construction, operation and maintenance of the Project. Among other things, the plan will include an operations and maintenance plan and a traffic management and traffic control plan.</p>
Review and Oversight by Department	<p>Department will have the right to review and comment on, or approve, certain submittals. The Contract Documents shall specify the standards for Department approvals (sole discretion, reasonable approval, etc.) Department approvals do not relieve Developer from complying with the Contract Documents.</p>
Design and Construction	
Design and Construction Generally	<p>Developer is responsible for design and construction in accordance with the Contract Documents.</p>
Design and Construction Monitoring	<p>Department shall have the right to perform oversight and auditing of the work to determine that it is performed in accordance with the Contract Documents.</p> <p>Developer will provide and implement a quality assurance/quality control plan, , which must comply with the standards and specifications set forth in the Technical</p>

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	Requirements.
Right of Way	<p>Department has obtained or will obtain agreed right of way and rights of entry for the work, including temporary construction staging areas. Developer will confirm adequacy of the agreed right of way and rights of entry for the work. Developer will be responsible for obtaining all additional rights of way, rights of entry and other property rights, including additional temporary rights of way and rights of entry that are desirable for the Project.</p> <p>The Department, SFCTA and the Presidio Trust have executed a right of entry agreement under which the Presidio Trust has established terms and conditions regarding entry onto and use of Trust lands for the Project. There also is a programmatic agreement among various federal, state and local agencies, entered into pursuant to section 106 of the National Historic Preservation Act, establishing procedures, terms and conditions for preservation of historical structures and archaeological resources. Developer will be obligated to adhere to the right of entry agreement and the programmatic agreement.</p> <p>Developer will be entitled to relief in the event of Department's failure to provide the agreed right of way and right of entry in a timely manner.</p>
Utilities	<p>Utility adjustment work is not included in the Contract Documents and will be performed by others. To the extent Developer encounters unidentified trunk and mainline Utilities, or if there is unreasonable delay by a utility in its performance of work to relocate them or to provide utilities for the Project, Developer will be entitled to relief.</p>
Permits	<p>Department has obtained or will obtain key permits and governmental approvals as specified in the Contract Documents. Developer will be responsible for obtaining all other permits and government approvals.</p>
Hazardous Materials	<p>Developer shall be responsible for the handling and remediation of Hazardous Materials.</p> <p>The costs for remediation of Hazardous Materials that are existing in the right of way as of the Effective Date ("Pre-Existing Hazardous Materials") are allocated as follows:</p> <ul style="list-style-type: none"> -Developer is responsible for the first \$XX million in costs. -The second \$YY million in costs are shared [50/50] by

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	<p>Department and Developer.</p> <p>-After the second \$YY million in costs, Department shall pay 100% of the costs.</p> <p>Developer is responsible for the remediation cost of Hazardous Materials that it releases.</p> <p>Developer is entitled to relief in the event of a release of Hazardous Materials by a third party other than a Developer-Related Entity.</p> <p>Developer is entitled to compensation in the event of a release of Hazardous Materials by Department.</p> <p>Department shall be the “generator” of all Pre-Existing Hazardous Materials and releases of Hazardous Materials by those other than Developer-Related Entities.</p> <p>Developer shall be the “generator” of all Hazardous Materials that any Developer-Related Entity releases.</p>
Cultural/Archeological Heritage	<p>Developer is entitled to relief in the event undisclosed or unexpected items of cultural or archeological heritage are found. Developer is not entitled, however, to any relief or compensation for complying with provisions of the Contract Documents relating to the historical preservation of the Project site and surrounding historical structures; provided that relief may be available for reasonably unexpected requirements and conditions imposed by governmental entities administering the programmatic agreement or unexpected delays by those governmental entities in taking actions required from them in order to proceed with work..</p>
Traffic Management and Control	<p>Developer will be responsible for traffic management and control during design and construction. The Developer’s traffic management and control responsibilities will apply to both work designed and constructed by Developer (Contracts 5 through 8, or “Phase II”) as well as work not designed and constructed by Developer (Contracts 3 and 4, or “Phase I”).</p>
Operations and Maintenance	
Operating Standards and Requirements	<p>Developer shall operate and maintain the Project in accordance with best management practices, the Contract Documents and applicable laws and approvals.</p> <p>Non-discriminatory changes (changes of general application to Department projects) will be implemented at Developer’s expense for all added operations and maintenance costs and</p>

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	<p>up to a cap on capital expenditures to be set forth in the Agreement, and at Department's expense for capital expenditures above the cap.</p> <p>Discriminatory changes (changes directed at the Project or Developer that are more onerous than those applied to other Department projects) are treated as Department Changes.</p> <p>Noncompliance with operating standards and requirements will result in decreases in payment and may result in termination.</p>
O&M Scope	<p>Developer will be responsible for operation and maintenance of all Project facilities, including the operation and maintenance of work designed and constructed by Developer (Phase II) as well as work not designed and constructed by Developer (Phase I), except that Department will retain responsibility for monitoring tunnel traffic flow and safety from its traffic management center, and may retain responsibility for certain other functions.</p>
Existing Structures and Facilities	<p>In coordination with Department's timing for issuing a final acceptance of Phase I of the Project, Developer and Department shall inspect all existing structures and facilities of Phase I. If defects are discovered during such inspections, Department will elect either to remedy the defects itself or have Developer perform the corrective work at Department's expense.</p> <p>As of the Substantial Completion Date, Developer shall be deemed to accept such existing structures and facilities in their then-current condition, except for Structural Latent Defects. Notwithstanding the foregoing, Department will be responsible for Structural Latent Defects on the following terms and conditions: (a) the Structural Latent Defects must be discovered and reported to Department not later than [3-5] years after completion of the inspection, and (b) Department's responsibility for the Structural Latent Defects will apply only to the extent they are not attributable to substandard maintenance and repair. Thereafter, Developer will bear all risk of such latent defects.</p>
O&M Monitoring	<p>Department will perform oversight and audits relating to Developer's O&M Work in accordance with the Contract Documents. The O&M monitoring will include self-monitoring by Developer, electronic monitoring systems and audit inspections by Department.</p> <p>Developer will prepare and implement a quality assurance/quality control plan for the O&M Work, which must</p>

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	comply with the performance standards and output specifications set forth in the Technical Requirements.
Technology Enhancements	<p>Developer may be required to implement technology enhancements during the term. Technology enhancements include modifications, revisions and upgrades to enforcement systems, computer systems, software and other technology used for the operation of the Project.</p> <p>There is no relief for technology enhancements that are required before Substantial Completion. After the Substantial Completion Date, allocation of the cost of technology enhancements will be treated the same as changes in O&M standards. See "Operating Standards and Requirements" above.</p>
Renewal Work	<p>Developer will perform renewal work (maintenance and rehabilitation work not normally included in annual maintenance budgets) when necessary to maintain compliance with performance standards. Developer will provide a yearly report of renewal work performed and a renewal work schedule for the coming year.</p> <p>Developer shall establish a renewal work reserve to fund the renewal work, compliance work, and work pursuant to handback requirements. In lieu of a reserve account, Developer may provide a letter of credit, which Department may draw on in the event that Developer fails to perform the required renewal work.</p>
Handback Requirements	<p>Department will inspect the project at the times and according to the terms set forth in the handback requirements. Developer will perform renewal work necessary prior to reversion of the Project to Department. At the conclusion of the Operating Period, the Developer will transfer the Project in the condition set forth in the Contract Documents.</p> <p>For a specified period (e.g. four years) before the end of the term, Developer shall establish a handback requirements reserve to fund the required handback work for the amount determined pursuant to the Contract Documents. At that time, any funds left in the renewal work reserve are transferred into the handback requirements reserve. In lieu of a reserve account, Developer may provide a letter of credit, which Department may draw on in the event that Developer fails to comply with the handback requirements.</p>

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Noncompliance	
Noncompliance Points and Noncompliance Events	<p>Department will assess noncompliance points for Developer's failure to meet availability and performance requirements or satisfy contract requirements for both the design and construction and operations and maintenance work. The accumulation of noncompliance points will lead to additional oversight and monitoring, and may result in termination.</p> <p>Noncompliance points are not directly linked to liquidated damages. Instances of non-compliance, however, may lead to decreases in Milestone Payments or Availability Payments.</p>
Contracting and Labor Practices	
Contracting	<p>Developer shall be entitled to contract with others to perform the work, but such contracts shall not relieve Developer of responsibility for the work. Developer shall not terminate or substitute any Key Contractor without Department's approval. The provisions that are to be included in Key Contracts shall be set forth in the Agreement.</p>
Labor Standards	<p>Developer will comply with applicable labor standards, including payment of prevailing wages.</p>
UDBE/DBE Program	<p>Developer will comply with UDBE/DBE Program requirements.</p>
Relief Events	
Relief Event Categories	<p>The following are Relief Events:</p> <ul style="list-style-type: none"> Force Majeure Events; Changes in state law; Department Changes; Discriminatory and non-discriminatory O&M Changes; Department failure to perform or observe any of its material covenants or obligations under the Agreement or other Contract Documents; Department-Caused Delays (including certain suspensions, failure to issue notices to proceed within required times, failure to respond to submittals in times specified); Certain delays in Department's acquisition of Right of Way, and the lack or loss of Department's continued rights in Right of Way;

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	<p>The development or operation of a Business Opportunity in the Airspace or Project Right of Way;</p> <p>Violation of Law by Department or a third party that materially and adversely impacts the Project or Developer;</p> <p>Unexpected performance of (or failure to perform) works in the vicinity of the Project Right of Way carried out by Department or a Governmental Entity that disrupts Developer's onsite work;</p> <p>Discovery on or near the Project right of way of items of cultural / archeological significance;</p> <p>Discovery on or near the Project right of way threatened or endangered species;</p> <p>Release of Hazardous Materials by Department or a third party who is not a Developer-Related Entity;</p> <p>Issuance of a temporary restraining order or other form of injunction or legal order by a court that prohibits prosecution of any portion of the work;</p> <p>Safety Compliance Orders;</p> <p>Issuance of a directive from the U.S. Department of Homeland Security or any Governmental Entity regarding specific security threats to the Project or the region in which the Project is located or which the Project serves;</p> <p>Pre-Existing Hazardous Materials;</p> <p>Structural Latent Defects (i.e. in structures and facilities in Phase I of the Project) discovered during the [3-5] year period after the inspection (see "Existing Structures and Facilities" above); and</p> <p>Delays in obtaining major permits, or unexpected delay in obtaining from the Presidio Trust action on a matter for which its prior approval is required under the Presidio Trust Right of Entry Agreement or Programmatic Agreement.</p> <p>Utility owner delays;</p> <p>Discovery of Unknown Utilities affecting Phase II construction</p>
Developer Relief for Relief Events	<p>When a defined Relief Event occurs, the Developer is entitled to an extension of the Completion Deadlines if the event occurs during the Construction Period and impacts the critical path. If the Relief Event occurs during the Operating Period, Developer is entitled to a temporary suspension of the Developer's obligation to meet performance standards or provide full service if the Relief Event materially impacts the Developer's</p>

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	<p>ability to meet the performance standards or provide full service – provided in both cases that the Developer would otherwise have met such deadlines or obligations.</p> <p>The Developer is entitled to extra work and delay costs associated with specified Relief Events.</p> <p>The Agreement will outline the limitations to Developer’s entitlement to relief, time extensions and compensation based on the nature of the Relief Events. Limitations may include the Developer retaining responsibility for the first \$XXXX (to be determined) of extra work costs or the first XX (to be determined) days of delay costs. Developer may also not be entitled to relief until the Relief Event has lasted at least XX days.</p>
Force Majeure Events	<p>“Force Majeure Events” means the occurrence of certain specified events outside the control of the parties that materially and adversely affect performance of Developer’s obligations, provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by Developer or any Developer-Related Entity. Force Majeure Events will be specifically listed in the Agreement.</p> <p>Time extensions and compensation will be provided for Force Majeure Events, with a right to terminate under certain circumstances.</p>
Compensation for Extra Work and Delay Costs	<p>Developer is entitled to compensation for extra work and delay costs for certain Relief Events. For those Relief Events, payment may be made in the Department’s discretion (a) through periodic payments in accordance with a written payment schedule, (b) in a lump sum, (c) by adjustment to the maximum availability payment so as to make up all or any portion of such amount, (d) by extension of the Term so as to make up all or any portion of such amount, (e) any combination of the foregoing, or (f) in such other manner as agreed upon by the parties or determined through the dispute resolution procedures.</p>
Availability Payments During Delay in Project Opening	<p>In the event of delay in the trigger date for starting availability payments due to certain Relief Events, Department will compensate Developer based on a formula set forth in the Agreement for a portion of the Availability Payments that would otherwise be due during the period of delay. The reduction in the amount of these Availability Payments will be based on</p>

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	Department's estimate of Developer's avoided costs of performing operations and maintenance.
Delays Relating to Milestone Payments	In the event of a delay in a Milestone Payment due to certain Relief Events, Developer will be entitled to compensation for the additional interest it accrues as a result of the delay.
Extended Relief Events	Either party is entitled to request termination of the Agreement if a Relief Event (other than Department default) lasts longer than [270] days. If a request for termination is rejected by the Department, the Department will compensate the Developer. If a request for termination is rejected by the Developer, the Developer shall be entitled to extension of Completion Deadlines but shall not be entitled to any further compensation.
Changes	
Changes	Changes in the work may be initiated by either Department or Developer. Developer-initiated changes are subject to Department approval. Department bears cost and delay risks due to Department changes. Developer bears cost and delay risks due to Developer changes.
Developer Compensation	
Milestone Payments	<p>Department will make one or two lump sum payments to the Developer in amounts and at times to be determined ("Milestone Payments").</p> <p>Milestone Payments will be adjusted based on construction period closures and Noncompliance with the Contract Documents.</p> <p>Milestone Payments may be reduced and offset by damages to Department due to failures to design and construct according to contract requirements.</p> <p>Milestone Payments also may be reduced by liquidated damages for failing to meet the deadline for Final Acceptance. See "Completion Milestones/Dates" above.</p>
Payment Mechanism	<p>Developer will bid a single Maximum Availability Payment ("MAP") for a year specified. Availability Payments will be earned and paid as provided in the Agreement.</p> <p>Developer will begin earning Availability Payments upon Substantial Completion or Final Acceptance, but in no event earlier than the Early Completion Date.</p>

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	<p>Availability Payments will be adjusted based on factors as set forth in the Contract Documents. See Project Proposal Report for further discussion of Availability Payment adjustments.</p> <p>Availability Payments will not be adjusted over time for traffic growth. A portion of the Availability Payments ($\pm 15\%$) will be adjusted over time for inflation per changes in the CPI.</p>
Tolling	<p>Developer will have the authority to impose tolls and user fees pursuant to Streets and Highways Code Section 143(j)(1) provided Developer satisfies certain conditions precedent, including obtaining approval from the Department and various local governments and agencies, complying with applicable environmental laws and governmental permits, agreement between the Department and the Authority on the disposition of excess toll and user fee revenues payable to the Department, and legal compliance with Section 143(q).</p> <p>If tolling commences, then Availability Payments will cease and the Department will be entitled to [85%] of toll revenues in excess of the Availability Payments that would have been in effect.</p>
Financing	
Financing	<p>Developer is responsible for financing the Project, and shall provide the Department in its proposal with a comprehensive description of the financing plan.</p> <p>Developer will run a financing competition designed to maximize competition among qualified debt sources for financing the Project. The results of the financing competition will be compared to the costs of financing reasonably assumed in the Developer's financing plan. The amount of the availability payments will be adjusted (up or down) for differences between the actual cost of financing and that reasonably assumed in the financing plan.</p> <p>If there is an upward adjustment causing the availability payments to exceed a pre-determined cap, Department may have a right to terminate the Agreement and Lease.</p>
Refinancing	<p>Developer has the right, with Department's written consent, to refinance funding agreements. Department is to share equally in any refinancing gains.</p>
Taxes	<p>Developer is responsible for payment of all applicable taxes and assumes the risk of future changes in tax laws of general</p>

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	application, with a possible exception for ad valorem real property taxes.
Appropriations Risk	<p>Developer assumes the risk of appropriations by Legislature, provided Department will be required to take certain steps to include the payments in its budget requests.</p> <p>If the Department fails to make payments when due, Developer may declare a default; which default could lead to termination and other contractual remedies.</p>
Lenders' Rights	
Lenders' Rights	<p>Lenders will have the right to notice and the opportunity to step in and cure in the event of Developer default. Lenders will have no greater rights than the Developer other than a limited time extension to step in and cure.</p> <p>Lenders are third party beneficiaries of the lenders' rights provisions in the Agreement, and may enter into direct agreements with the Department confirming these rights.</p>
Developer Ownership and Control	
Changes in Ownership and Changes in Control	<p>There shall be no change in equity ownership of the Developer (equity transfers) between commercial close and two years after the Substantial Completion Date.</p> <p>During the third through the sixth years after the Substantial Completion Date equity transfers are allowed, provided that one or more of the initial Equity Members collectively maintain more than 50% of the equity interest in Developer. Starting in the seventh year, this 50% requirement no longer applies.</p> <p>All equity transfers that occur more than two years after the Substantial Completion Date and do not rise to the level of a change of control of Developer shall be subject to Department's prior review and written concurrence that the equity transfer is permitted.</p> <p>All equity transfers that occur more than two years after the Substantial Completion Date and result in a change in control of Developer are subject to Department's reasonable approval.</p>
Insurance, Indemnity and Payment/Performance Security	
Insurance	<p>Developer shall provide required insurance coverages.</p> <p>Developer will be entitled to an increase in the Availability Payment for significant increases in premiums due to market-</p>

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	<p>based factors, via an insurance benchmarking procedure.</p> <p>In the event the required insurance is unavailable or unavailable at commercially reasonable rates, Department may elect to act as the insurer of last resort and be entitled to a credit for any insurance premium savings resulting from modification or elimination of the insurance requirements. Alternately, Department may elect to terminate the Agreement and pay termination compensation the same as upon termination for an Extended Relief Event.</p>
Indemnity	<p>Developer shall indemnify, defend, protect and hold harmless Department against any claims or losses resulting or accruing from Developer's responsibilities and liabilities under the Agreement, including Developer's breach of the Agreement, and negligence, willful misconduct or breach of applicable Law or contract.</p>
Performance Security	<p>Developer shall provide or cause its design-build contractor to provide performance bonds or letters of credit (in amounts to be determined by Department). Department may also require payment bonds or letters of credit (in amounts to be determined by Department).</p>
Default and Remedies	
Developer Defaults	<p>Developer Defaults include:</p> <p>Developer fails to satisfy the applicable conditions to commencement of the Design Work within 30 days of the Effective Date;</p> <p>Developer fails to begin the applicable portion of the Design Work within 10 days following Department's issuance of NTP 1;</p> <p>Developer discontinues the prosecution of the work for a period of 30 days or more;</p> <p>Developer fails to perform the work with sufficient resources to ensure prompt completion of the work;</p> <p>Developer fails to perform the work or any portion thereof in accordance with the Contract Documents (unless addressed by Noncompliance Points);</p> <p>Developer fails to comply with applicable Governmental Approvals and Laws;</p> <p>Developer fails to make an undisputed payment to Department</p>

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	<p>under this Agreement when due, or fails to deposit funds to any reserve or account in the amount and within the time period required by this Agreement;</p> <p>There occurs any use of the Project or a material portion thereof in violation of or not otherwise contemplated by the Contract Documents, the Technical Requirements, Governmental Approvals or Laws (except violations of Law by Users);</p> <p>Developer fails to obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other performance security as and when required under the Agreement, or fails to comply with any requirement of the Agreement pertaining to the amount, qualifications, terms or coverage of the same;</p> <p>Developer makes or attempts to make an assignment or transfer in violation of the limitations on assignment or transfer or there occurs an unpermitted equity transfer or change of control;</p> <p>Any representation or warranty made by Developer in the Contract Documents, or documents delivered to Department pursuant to the Contract Documents, is false in any material respect or materially misleading or inaccurate in any material respect when made or omits material information when made;</p> <p>Developer fails to timely observe or perform any other material covenant, agreement, obligation, term or condition required to be observed or performed by Developer under the Contract Documents;</p> <p>Bankruptcy or insolvency events of Developer, any Equity Member or any guarantor;</p> <p>Developer fails to comply with Department's written suspension of work order;</p> <p>Developer fails to: (a) close its financing by the Financial Close Deadline, subject to specified excuses, (b) commence the Construction Work by the Construction Commencement Deadline; or (c) achieve Substantial Completion by the Long Stop Date;</p> <p>Persistent Developer Noncompliance exists;</p> <p>There occurs any closure of the Project or any portion thereof, or any lane closure, except as expressly permitted or excused under the Contract Documents or Department-approved Traffic Management Plan; and</p> <p>Developer, an Equity Member, any of certain Affiliates of</p>

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	Developer, or a Key Contractor is suspended or debarred.
Cure of Developer Defaults	Developer shall be provided the opportunity to cure certain Developer Defaults, as described in the Contract Documents.
Department Remedies for Developer Default	<p>Department shall have the right to exercise one or more of the following remedies in the event of an uncured Developer Default:</p> <p>Right to enter and take control of the Project to cure the default, restore the permitted uses and reopen and continue operations for the benefit of Developer and the public, all at Developer's expense (entry to rectify wrongful uses or closures of the Project can be immediate, without giving notice or awaiting lapse of any cure period);</p> <p>Certain rights to ensure implementation of and compliance with Safety Standards;</p> <p>Right to suspend work for certain Developer Defaults;</p> <p>Right to recover damages for a Developer Default and for specified persistent Developer defaults;</p> <p>Right to make demand upon, draw on, and enforce and collect any bonds, letters of credit, guaranty, or other performance security available to Department for Developer Default;</p> <p>Right to terminate in the event of a material Developer Default that, after delivery of a warning notice and failure to cure, becomes a default termination event; and</p> <p>Other remedies as provided by Law.</p>
Department Defaults	<p>Department Defaults include:</p> <p>Failure to make any payment due the Developer under the Agreement when due after expiration of the cure period to be defined in the Agreement;</p> <p>If any express representation or warranty made by Department is false or materially misleading or inaccurate when made in any material respect or omits material information when made; and</p> <p>If Department or other Governmental Entity confiscates, sequesters, condemns or appropriates the Project or any material part thereof, or Developer's Interest or any material part thereof, excluding a Termination for Convenience or any other exercise of a right of termination set forth in the Agreement.</p>

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Cure of Department Defaults	Department shall be provided the opportunity to cure Department defaults, as described in the Contract Documents.
Developer Remedies for Department Default	<p>Developer shall have the right to exercise one or more of the following remedies in the event of an uncured Department default:</p> <p>Right to terminate the Agreement for a material failure to pay or material confiscation of Developer's Interest; or</p> <p>Right to seek damages or other remedies as provided by law.</p>
Limitations on Liability	Subject to limitations for certain losses, Department and Developer waive punitive damages or any indirect or incidental consequential damages except as set out in the Agreement, whether arising out of breach of the Agreement, tort (including negligence), or any other theory of liability.
Appropriations Risk	Same as provided under Financing.
Early Termination and Compensation for Early Termination	
Grounds for Termination	The Agreement may be terminated for: Developer's failure to close its financing by the Financial Close Deadline, extended Relief Events, certain defaults by either party; convenience of Department, court order voiding the Agreement or making performance impossible, and unavailable of insurance.
Compensation Entitlement	In the event of a termination prior to the end of the term, the Developer shall be entitled to compensation based on the nature of the termination.
Termination for Failure to Close Financing	<p>If Developer's failure to timely close financing is excused due to specified conditions, including keeping adjustments to the availability payments within a cap, Department may compensate Developer for some or all of Developer's previously incurred costs.</p> <p>If Developer's failure to timely close financing is not excused, Developer will owe liquidated damages to Department in a stated amount. As a condition to signing the Agreement, Developer will be obligated to deliver to Department liquid security (forfeiture bond or letter of credit) to assure Department a ready source for collecting these damages.</p>
Termination for Extended Relief	If a Relief Event lasts more than [270] days, either party may terminate with the concurrence of the other.

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Events, Court Ruling, or Insurance Unavailability	<p>As full and final payment and satisfaction of Department's obligations, Department shall pay Developer (or to its lenders when duly pledged) a termination payment in an amount equal to:</p> <p>(1) The Project Debt and net breakage costs; plus</p> <p>(2) Previously committed equity investment less any distributions; plus</p> <p>(3) out of pocket termination costs;</p> <p>minus</p> <p>(4) All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date if and to the extent such amounts are available to pay items (1) through (3).</p>
Termination for Convenience, Department Default, or Department Suspension of Work	<p>In its Project proposal, Developer will select the formula (Forward Looking or Backward Looking) for the termination payment that will apply upon a Termination for Convenience, termination due to Department Default, termination due to Department Suspension of Work, or Termination by Court Ruling. As full and final payment and satisfaction of Department's obligations, Department shall pay Developer (or to his lenders when duly pledged) a termination payment in an amount equal to:</p> <p>(1) The Project Debt and net breakage costs; plus</p> <p>(2) If Backward Looking: An amount which gives an internal rate of return on previously committed equity investment equal to the Equity IRR, after taking into account all distributions previously paid to Equity Members.; If Forward Looking: The amount of all distributions anticipated in the Financial Model to be paid between the Early Termination Date until the date of expiration of the Term, each amount discounted back at the Equity IRR; plus</p> <p>(3) out of pocket termination costs;</p> <p>minus</p> <p>(4) All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date if and to the extent such amounts are available to pay items (1) through (3).</p>

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Termination for Developer Default	<p>The termination settlement payment will be:</p> <p>(1) The lesser of (a) Project Adjusted Costs, or (b) the costs as shown in the Schedule of Values for work completed as of the Early Termination Date; plus</p> <p>(2) The lesser of (a) the actual costs incurred in performing the O&M Work, or (b) the costs shown in the O&M Work budget for the Construction Period, corresponding to the percentage of the O&M Work completed as of the Early Termination Date;</p> <p>minus the sum of (3) and (4) below:</p> <p>(3) Department losses due to Developer Default and the costs of replacing Developer; and</p> <p>(4) Any amounts previously paid by Department to Developer under the Agreement.</p> <p>(The Agreement, however, may provide a cap for the Termination Amount equal to [80%] of the outstanding Project Debt (including net breakage costs) minus the amount of (4) above not previously used to pay down Project Debt.)</p>
Appropriations Risk	Same as provided under Financing.
Dispute Resolution	
Dispute Resolution	Dispute resolution will include a disputes review board, all or some of whose decisions will be non-binding. Use of the board is a precondition to the initiation of arbitration or litigation.
Governing Law and Federal Requirements	
Governing Law	State of California
Federal Requirements	Developer will be required to comply with all requirements applicable to federally funded design-build and public-private partnership projects.

EXHIBIT A

1. Project Scope – Phase I

Developer will be responsible for the operation and maintenance of the following primary Doyle Drive Replacement Project components (Phase I):

Contract	Project Description
Contract 1	Advanced Environmental Mitigation – (wet land creation, biological mitigation, tree removal, plant material collection and propagation). Mitigation prior to construction activities. Building stabilization prior to construction activities. Grading and contractor access. Geotechnical Demonstration - Cement Deep Soil Mixing (CDSM), for tunnel construction and pile indicators. Environmental mitigation during construction is accounted for in the individual contract budgets.
Contract 2	Utility relocation prior to construction activity, including water, electric, sewer and telecommunications, and including private utility relocation for items owned by the Presidio. (Public utility relocations included in the Right of Way (ROW) data sheet).
Contract 3	Ruckman, Southern Park Presidio Interchange (PPI), South Bound (SB) High Viaduct. Including the southbound portion of the Presidio Interchange.
Contract 4	South Bound (SB) Battery Tunnel, at grade detour, retaining wall # 6 and 8, permanent roadway sections, long weekend closure, partial demolition of low viaduct structures & open at-grade detour to public traffic.

2. Project Scope – Phase II

Developer will be responsible for the design, construction, operation, maintenance and financing of the following primary Doyle Drive Replacement Project components (Phase II):

Contract	Description
Contract 5	Main Post Tunnels, Northbound Battery Tunnel, Electrical and Mechanical Substation, Traffic Switch (Full Weekend Closure)
Contract 6	Girard Road Undercrossing, Low Viaduct
Contract 7	Northbound High Viaduct, Northern Park Presidio Interchange, Northbound Roadway to Merchant Road, Demolish Existing High Viaduct
Contract 8	Landscaping

DRAFT PUBLIC-PRIVATE AGREEMENT AND DRAFT LEASE AGREEMENT



PUBLIC-PRIVATE AGREEMENT
for the
PRESIDIO PARKWAY PROJECT

Between

California Department of Transportation

and

[XXXXXXXXXXXXXXXXXXXXX]

Contract # [XXXXXX]

Dated [XXXXXXX]

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**PUBLIC-PRIVATE AGREEMENT
PRESIDIO PARKWAY PROJECT**

This Public-Private Agreement ("**Agreement**") is entered into and effective as of _____, 20__ by and between:

- (a) the California Department of Transportation, a public agency of the State of California ("**the Department**"); and
- (b) _____, a _____ ("**Developer**").

BACKGROUND:

A. The Department in cooperation with the San Francisco County Transportation Authority (the "**Authority**") wishes to develop, design, construct, finance, operate and maintain the Presidio Parkway Project (the "**Project**") through a public-private partnership. The facility will consist of a new six-lane parkway-type roadway and a southbound auxiliary lane, between the Park Presidio Interchange and the new Presidio access at Girard Road, which will replace the existing Doyle Drive facilities along Route 101 in the City of San Francisco. The Department will be responsible for the design, financing and construction of the Phase I Construction; the Developer will be responsible for the design, financing and construction of the Phase II Construction, as well as providing for the long-term operations and maintenance of both phases of the Project, all as provided in this Agreement.

B. The Department issued a Request for Qualifications for the Project on February 2, 2010 and four addenda thereto (collectively, the "**RFQ**"). The Department issued these and all subsequent procurement documents for the Project pursuant to Section 143 of the California Streets and Highway Code ("**Section 143**"). Section 143 grants the Department the authority to solicit proposals from and enter into agreements with private entities, or consortia thereof, for the planning, design, development, finance, construction, reconstruction, rehabilitation, acquisition, lease, operation or maintenance of transportation projects such as the Project.

C. On _____, 2010, pursuant to the procurement process outlined in the RFQ, the Department selected [XXXXXX] short-listed proposers based on their respective financial and technical qualifications as detailed in their responses to the RFQ. The Department then issued a Request for Proposals to these short-listed proposers, which included various RFP documents and addenda thereto (collectively, the "**RFP**").

D. On _____, 2010, the Department selected Developer as the best value proposer. The Department's decision was based on its overall evaluation of the proposals, and the Department's conclusion that Developer has offered the best value in its Proposal, based on Developer's Maximum Availability Payment, together with its approach to project management, financing, design and construction, quality assurance and control, and operations and maintenance of the Project within the O&M Limits.

E. On _____, 2010, pursuant to Section 143, the California Transportation Commission, at a regularly scheduled public hearing, (a) selected and approved the Project for procurement and entry into of a comprehensive development lease agreement, (b) certified the

Department's determination of the useful life of the Project in establishing the terms of this Agreement, and (c) approved and adopted criteria for evaluating proposals solicited by the RFP.

NOW, THEREFORE, in consideration of the sums to be paid by the Department to Developer, the Work to be financed and performed by Developer, the foregoing recitals and the covenants and agreements set forth herein, the Parties hereby agree as follows:

ARTICLE 1. DEFINITIONS; CONTRACT DOCUMENTS

1.1 Definitions

Definitions for certain capitalized terms used in this Agreement and the other Contract Documents are contained in Appendix 1.

1.2 Contract Documents; Order of Precedence

Each of the Contract Documents is an essential part of the agreement between the Parties and a requirement occurring in one is as binding as though occurring in all. The Contract Documents are intended to be complementary and to describe and provide for a complete comprehensive development lease agreement authorized by Section 143.

1.2.1 In the event of any conflict, ambiguity or inconsistency among the Contract Documents, the order of precedence shall be as follows:

1. Supplemental Agreements and amendments to the Contract Documents;
2. Volume I (this Agreement, including all Appendices, except Appendix 2 which has a lower order of precedence);
3. Volume II (Technical Requirements), excepting the Manuals and Guidelines which have a lower order of precedence
4. The Manuals and Guidelines; and;
5. Appendix 2 to this Agreement, constituting Developer's Proposal Commitments.

1.2.2 Notwithstanding the order of precedence among Contract Documents set forth in this Section 1.2, in the event of any conflict, ambiguity or inconsistency between or among any of the provisions in this Agreement, or between provisions in this Agreement and any other Contract Document, the provisions that establish the higher quality, manner or method of performing the Work, exceed Best Management Practices, or use more stringent standards will prevail. If Developer's Proposal Commitments include statements, terms, concepts or designs that can reasonably be interpreted as offers to provide higher quality items than otherwise required by the other Contract Documents or to perform services or meet standards in addition to or better than those otherwise required, then Developer's obligations hereunder shall include compliance with all such statements, terms, concepts and designs. Additional details in a lower priority Contract Document shall be given effect except to the extent they conflict with requirements, provisions and practices contained in the higher priority Contract Document.

1.2.3 Notwithstanding the order of precedence among Contract Documents set forth in this Section 1.2, in the event of a conflict between or among the Manuals and Guidelines, the Department shall have the right to determine, in its sole discretion, which provision applies. Developer shall request in writing the Department's determination respecting the order of precedence involving the Manuals and Guidelines promptly upon becoming aware of any such conflict.

1.3 Reference Documents

1.3.1 The Department has provided the Reference Documents to Developer. The Reference Documents are for information only, and are not mandatory or binding on Developer, except to the extent (a) the Reference Document is a Governmental Approval or (b) information in the Reference Documents is expressly made a contractual requirement as part of the Technical Requirements. Developer is not entitled to rely on the Reference Documents as accurately describing existing conditions, presenting design, engineering, operating or maintenance solutions or directions, or defining means or methods for complying with the requirements of the Contract Documents, Governmental Approvals or Law.

1.3.2 The Department shall not be responsible or liable in any respect for any causes of action, claims or Losses whatsoever suffered by any Developer-Related Entity by reason of any use of information contained in, or any action or forbearance in reliance on, the Reference Documents.

1.3.3 The Department does not represent or warrant that the information contained in the Reference Documents is complete or accurate or that such information is in conformity with the requirements of the Contract Documents, Governmental Approvals or Laws. Developer shall have no right to submit a claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief on account of any incompleteness or inaccuracy in the Reference Documents, including any incompleteness or inaccuracies regarding the location, size, character and extent of Utilities, Hazardous Materials and subsurface conditions.

ARTICLE 2. CONCESSION GRANT AND TERM

2.1 Grant of Concession

2.1.1 Pursuant to the provisions of Section 143 and subject to the terms and conditions of the Contract Documents, the Department hereby grants to Developer the exclusive right, and Developer accepts the obligation, (a) to develop, design, construct and finance the Phase II Construction, (b) to use, manage, operate, maintain and repair the Project, and to perform Renewal Work and Upgrades, and (c) to enter into the Lease in the form attached as Appendix 3.

2.1.2 Subject to Section 4., Developer shall have the right to enter onto Project Right of Way and certain other adjacent lands owned by the Department, the Presidio Trust or other Governmental Entities for purposes of carrying out its obligations under this Agreement. Notwithstanding the foregoing, Developer shall be responsible for compliance with the terms and provisions of the Presidio Trust Right of Entry Agreement and the Programmatic Agreement, including paying all applicable charges and related fees and obtaining all consents

or approvals for access by any Developer-Related Entity to the Project Right of Way to perform any Work required under this Agreement. The Department and Authority shall provide reasonable assistance to Developer in obtaining the necessary consents or approvals required to access lands owned by the Presidio Trust or other Governmental Entities as required pursuant to the Presidio Trust Right of Entry Agreement and the Programmatic Agreement for purposes of carrying out the Developer's responsibilities under this Agreement.

2.1.3 Department and Developer acknowledge that they have executed two counterparts of the Lease and placed them in a neutral escrow for safekeeping pursuant to the Lease Escrow Agreement. Upon the commencement of the Operating Period, and as a ministerial act, Department and Developer shall date the Lease, attach all legal descriptions pertaining to the Project Right of Way, excluding all Airspace, and each Party shall deliver to the other Party, and the other Party shall accept, the Lease. Thereupon, the Lease shall take effect and the right of entry under Section 2.1.2 shall automatically cease to have effect (but the obligation under Section 2.1.2 to comply with the terms and provisions of the Presidio Trust Right of Entry Agreement shall continue in full force and effect). Neither the Lease nor a memorandum thereof shall be recorded.

2.1.4 Developer's rights granted in this Section 2.1 are limited by and subject to the terms and conditions of the Contract Documents, including the Department's sole ownership of fee simple title to the Project and the Department's, the Presidio Trust's and other Governmental Entities' ownership of the Project Right of Way and all improvements constructed thereon, subject to Developer's Interest including Developer's leasehold estate under the Lease.

2.2 Term of Concession

2.2.1 This Agreement shall take effect on the Effective Date, and shall remain in effect until the earlier of (a) [33] years after the Effective Date; or (b) the termination of this Agreement as provided herein (the "Term"); provided that the Department may extend the Term as provided in Section 9.3.1(d).

2.2.2 The Parties acknowledge that Developer's rights and obligations to finance and pay for development of the Phase II Construction, manage, operate, maintain and repair the Project, and perform Renewal Work and Upgrades commence on the Effective Date notwithstanding the later commencement of the Lease, subject to issuance of NTP 1 and NTP 2, and the satisfaction of other conditions precedent to performance of the Work set forth in this Agreement.

ARTICLE 3. DEPARTMENT REVIEW AND OVERSIGHT

3.1 Preliminary Planning and Engineering Activities

3.1.1 Unless expressly provided otherwise in this Agreement for specific elements of the Work, Developer shall perform or cause to be performed all preliminary planning and engineering activities appropriate for design and construction of the Phase II Construction. The Department designates Developer as the Department's consultant pursuant to Section 143(f)(1)(B) of Section 143 to the extent that any such activities constitute project development services under Section 143(f)(1)(A) of Section 143.

3.1.2 Subject to Sections 4.10, 4.14 and 9.2, Developer shall bear the risk of any

incorrect or incomplete review, examination and investigation by it of the Site and surrounding locations and of any incorrect or incomplete information resulting from preliminary engineering activities conducted by Developer, the Department or any other Person. The Department makes no warranties or representations as to any surveys, data, reports or other information provided by the Department or other Persons concerning surface conditions and subsurface conditions, including information related to Utilities and Hazardous Materials, affecting the Site or surrounding locations. Developer acknowledges that such information is for Developer's general reference only.

3.2 Governmental Approvals

3.2.1 General

3.2.1.1 Prior to the Effective Date, the Department has obtained certain Governmental Approvals as described in Appendix 21. Developer shall be solely responsible for obtaining all remaining Governmental Approvals, including any revision, modification, amendment, supplement, renewal or extension thereof and of Governmental Approvals previously obtained by the Department, required in connection with the Project or the Work. Developer shall not be entitled to submit a claim for any Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, or other relief associated with securing and obtaining Governmental Approvals, except that: (a) Developer shall not be in default for failing to meet a Completion Deadline due to delays in obtaining Governmental Approvals, provided that such delays are beyond the reasonable control of the Developer-Related Entities, and (b) Developer may be entitled to submit a Claim for delays in obtaining Major Permits as provided under Section 3.2.2.

3.2.1.2 Developer shall take all actions necessary to comply with and to maintain in full force and effect all Governmental Approvals, including performance of all measures required by the Contract Documents or Governmental Approvals, except to the extent that responsibility for performance of such measures is expressly assigned to the Department in the Contract Documents.

3.2.2 Major Permit Delays

3.2.2.1 Appendix 21 identifies the Major Permits and the expected time necessary to secure each of the Major Permits, commencing from the date on which Developer submits a complete application in accordance with the Contract Documents to the applicable Governmental Entity ("**Major Permits Deadline**"). Developer shall be entitled to seek compensation, Completion Deadline extension and performance relief under Sections 9.2.2, 9.2.3 and 9.2.5 due to delays in obtaining a Major Permit by the applicable Major Permits Deadline, provided that such delays are beyond the reasonable control of the Developer-Related Entities.

3.2.2.2 Notwithstanding the provisions in this Section 3.2.2, Developer shall not be entitled to any relief relating to delays in obtaining Major Permits for the following:

1. Extra Work Costs;
2. Delay Costs of any kind;
3. Delays that could have been mitigated by Developer through reasonable

efforts;

4. Delays due to differences in the Indicative Preliminary Design and Developer's Final Design, unless such differences are due to a Department Change.

3.3 Submittals

3.3.1 General

This Section 3.3 sets forth uniform terms and procedures that shall govern all Submittals to the Department pursuant to the Contract Documents.

3.3.2 Department Discretionary Approvals

Certain Submittals are subject to the Department's approval in its sole or absolute discretion or good faith discretion. If the Submittal is one where the Contract Documents indicate approval is required from the Department in its sole or absolute discretion, or good faith discretion, then the Department's lack of approval, determination, decision or other action within the applicable time period under the Contract Documents shall be deemed a disapproval. If approval is subject to the sole or absolute discretion of the Department, then its decision shall be final, binding and not subject to dispute resolution, and such decision shall not constitute a basis for any claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief. If the approval is subject to the good faith discretion of the Department, then its decision shall be binding unless it is finally determined through the Dispute Resolution Procedures by clear and convincing evidence that such decision was arbitrary or capricious.

3.3.3 Department Review and Comment

Whenever the Contract Documents indicate that a Submittal or other matter is subject to the Department's review and comment and the Department delivers no comments, exceptions, objections, or rejections within the applicable time period under the Contract Documents, then Developer may proceed thereafter at its election and risk, without prejudice to the Department's rights to later object or disapprove the Submittal on the basis that such Submittal is not in accordance with the requirements of the Contract Documents. No such failure or delay by the Department to object to or disapprove Work not in compliance with the Contract Documents within the applicable time period under the Contract Documents shall constitute a basis for any claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief.

3.3.4 Submittals Not Subject to Prior Review, Comment or Approval

Whenever the Contract Documents indicate that Developer is to deliver a Submittal to the Department but express no requirement for Department review, comment, disapproval, prior approval or other Department action, then Developer is under no obligation to obtain Department approval of the Submittal before proceeding with further Work, and the Department shall have the right, but is not obligated, to at any time review, comment on, take exception to, object to, reject or disapprove the Submittal on the basis that such Submittal is not in accordance with the requirements of the Contract Documents. No failure or delay by the Department in delivering comments, exceptions, objections, rejections or disapprovals with respect to the Submittal shall constitute a basis for any claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief.

3.3.5 Other Department Approvals

3.3.5.1 Whenever the Contract Documents indicate that a Submittal or other matter is subject to the Department's approval or consent but the approval or consent is one not governed by Section 3.3.2 concerning discretionary approvals, then the standard for approval shall be reasonableness.

3.3.5.2 If the reasonableness standard applies and Department delivers no approval, consent, determination, decision or other action within the applicable time period under Section 3.3.8, then Developer may deliver to Department a written notice stating the date within which Department was to have decided or acted and that if Department does not decide or act within five Business Days after receipt of the notice, delay from and after lapse of the applicable time period may constitute Department-Caused Delay for which Developer may be entitled to relief under Article 9.

3.3.6 Resolution of Department Comments and Objections

3.3.6.1 If the Submittal is one not governed by Section 3.3.2, the Department's exception, objection, rejection or disapproval shall be deemed reasonable, valid and binding if based on (but not limited to) any of the following grounds:

1. The Submittal or subject provision thereof fails to comply, or is inconsistent, with any applicable covenant, condition, requirement, term or provision of the Contract Documents;
2. The Submittal or subject provision thereof is not to a standard equal to or exceeding Best Management Practice;
3. Developer has not provided all content or information required in respect of the Submittal or subject provisions thereof, provided that Developer shall have the subsequent opportunity to resubmit the Submittal with the required content or information; or
4. Adoption of the Submittal or subject provision thereof, or of any proposed course of action thereunder, would result in a conflict with or violation of any Law or Governmental Approval.

5. In the case of a Submittal that is to be delivered to a Governmental Entity as a proposed Governmental Approval, or in order to obtain, modify, amend, supplement, renew, extend, waive or carry out a Governmental Approval, it proposes commitments, requirements, actions, terms or conditions that are not usual and customary arrangements that the Department offers or accepts for addressing similar circumstances affecting its own projects.

3.3.6.2 Developer shall respond to all of the Department's comments and objections to a Submittal and, except as provided below, make modifications to the Submittal as necessary to fully reflect and resolve all such comments and objections, in accordance with the review processes set forth in this Section 3.3. Developer acknowledges that the Department may provide comments and objections which reflect concerns regarding interpretation or preferences of the commenter or which otherwise do not directly relate to grounds set forth in Section 3.3.6.1. Developer agrees to undertake reasonable efforts to accommodate or otherwise resolve any such comments or objections through the review processes described in this Section 3.3. However, if the Submittal is not governed by Section 3.3.2, the foregoing shall in no way be deemed to obligate Developer to incorporate any comments or resolve objections that (a) are not on any of the grounds set forth in Section 3.3.6.1, (b) are otherwise not reasonable, and (c) would result in a delay to a Critical Path, in Extra Work Costs or in Delay Costs, except pursuant to a Department Change. If, however, Developer does not accommodate or otherwise resolve any comment or objection, Developer shall deliver to the Department within a reasonable time period, not to exceed 30 days after receipt of the Department's comments or objections, a written explanation why modifications based on such comment or objection are not required. The explanation shall include the facts, analyses and reasons that support the conclusion.

3.3.6.3 The foregoing shall in no way be deemed to obligate Developer to incorporate any comments or resolve objections that would render the Submittal erroneous, defective or less than Best Management Practice, except pursuant to a Department Change.

3.3.6.4 If Developer fails to notify the Department within such time period, the Department may deliver to Developer a written notice stating the date by which Developer was to have addressed the Department's comments and that if Developer does not address those comments within five Business Days after receipt of this notice, then that failure shall constitute Developer's agreement to make all changes necessary to accommodate and resolve the comment or objection and full acceptance of all responsibility for such changes without right to a Relief Event, time, Financial Close Deadline or Completion Deadline extension, Extra Work Costs, Delay Costs, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other Claim, including any Claim that the Department assumes design or other liability.

3.3.6.5 After the Department receives Developer's explanation as to why the modifications are not required as provided in Sections 3.3.6.2, 3.3.6.3 and 3.3.6.4, the Parties shall attempt in good faith to resolve the dispute. If they are unable to resolve the dispute and the Submittal is one not governed by Section 3.3.2, the dispute shall be resolved according to the Dispute Resolution Procedures.

3.3.7 Limitations on Developer's Right to Rely

3.3.7.1 No review, comment, objection, rejection, approval, disapproval, acceptance, concurrence, certification (including notices of Substantial Completion and Final

Acceptance), monitoring, testing, inspection, spot checking, auditing or other oversight by or on behalf of the Department, and no lack thereof by the Department, shall constitute acceptance by the Department of Work that does not comply with the Contract Documents or waiver of any legal or equitable right held by the Department with respect to such Work under the Contract Documents or Law. The Department shall be entitled to exercise all rights and remedies under the Contract Documents or Law to bring the Work and the Project into compliance with requirements of the Contract Documents, regardless of whether previous review, comment, objection, rejection, approval, disapproval, acceptance, concurrence, certification, monitoring, testing, inspection, spot checking, auditing or other oversight were conducted or given by the Department. Developer at all times shall have an independent duty and obligation to fulfill the requirements of the Contract Documents. Developer agrees and acknowledges that any such activity or failure to conduct any such activity by the Department:

1. Is solely for the benefit and protection of the Department;
2. Does not relieve Developer of its responsibility for the selection and the competent performance of all Developer-Related Entities;
3. Does not create or impose upon the Department any duty or obligation toward Developer to cause it to fulfill the requirements of the Contract Documents;
4. Shall not be deemed or construed as any kind of warranty, express or implied, by the Department;
5. May not be relied upon by Developer or used as evidence in determining whether Developer has fulfilled the requirements of the Contract Documents, except that the issuance of the notices of Substantial Completion and Final Acceptance may be relied upon and used as evidence to establish the commencement of the Department's payment obligations and Developer's entitlement to receive the Availability Payments and Milestone Payments (as applicable), nevertheless without waiving the Department's rights and remedies against Developer for failing to meet the requirements of the Contract Documents; and
6. May not be asserted by Developer against the Department as a legal or equitable defense to, or as a waiver of or relief from, Developer's obligation to fulfill the requirements of the Contract Documents.

3.3.7.2 Developer shall not be relieved or entitled to reduction of its obligations to perform the Work in accordance with the Contract Documents, or any of its other liabilities and obligations, including its indemnity obligations, as the result of any activity identified in Section 3.3.7.1 or failure to conduct any such activity by the Department. Such activity or failure to conduct such activity by the Department shall not relieve Developer from liability for, and responsibility to cure and correct, any Nonconforming Work or Developer Defaults.

3.3.7.3 To the maximum extent permitted by Law, Developer hereby releases and discharges the Department from any and all duty and obligation to cause Developer's Work or the Project to satisfy the standards and requirements of the Contract Documents.

3.3.8 Time Periods

3.3.8.1 Except as otherwise provided in this Section 3.3.8, whenever the Department is entitled to review and comment on, or to affirmatively approve, a Submittal, the Department shall have a period of [28] days after the date the Department receives an accurate and complete Submittal in conformance with the Contract Documents to review, comment, or approve, as the case may be, the Submittal. The Department's review period for Developer's re-submission of a previously submitted Submittal shall be [14] days, unless provided otherwise in the Contract Documents. The Parties shall agree in good faith upon any necessary extensions of the review-comment-and-approval period to accommodate particularly complex or comprehensive Submittals.

3.3.8.2 If any provision of the Contract Documents expressly provides a longer or shorter period for the Department to act, such period shall control over the time period set forth in Section 3.3.8.1. If the time period for the Department to act should end on a day when the Department is closed or when Department employees are on furlough, the time period shall automatically be extended to the next day when the Department is open or when Department employees are no longer on furlough, as applicable.

3.3.8.3 Developer shall schedule, prioritize and coordinate all Submittals to allow an efficient and orderly Submittal review process. All time periods for the Department to act shall be extended by the period of any delay caused by the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity. In no event shall Developer be entitled to submit a claim for Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief for such extension of the review period.

3.3.8.4 During any time that the Department is entitled under Section 6.6 to increase the level of its auditing, monitoring, inspection, sampling, measuring, testing and oversight of Developer's compliance with its obligations under this Agreement, the applicable period for the Department to act on any Submittals received during such time shall automatically be extended by [10] days.

ARTICLE 4. DESIGN AND CONSTRUCTION

4.1 Obligations of Developer

4.1.1 General Duties

In addition to performing all other requirements of the Contract Documents, Developer shall:

4.1.1.1 Furnish all design and other services, provide all materials, equipment and labor and undertake all efforts necessary or appropriate (excluding only those materials, services and efforts which the Contract Documents expressly specify will be undertaken by the Department or other Persons) to construct the Phase II Construction and to maintain it during construction and to achieve Substantial Completion no later than the Long Stop Date;

4.1.1.2 Ensure that the Project Manager or the superintendent identified in Developer's Statement of Qualifications for the Lead Contractor, or one of its Department-approved designees, is present at the Site at all times during the performance of Construction Work to perform the obligations required under [Section ___ of Division ___];

4.1.1.3 Comply with, and require that all Contractors comply with, all requirements of all Laws applicable to the D&C Work;

4.1.1.4 Cooperate with the Department and Governmental Entities with jurisdiction in all matters relating to the Work, including their review, inspection and oversight of the design and construction of the Project; and

4.1.1.5 Exercise commercially reasonable efforts to mitigate delay and damages due to delay regardless of the cause of the delay, including by re-sequencing, reallocating, or redeploying Developer's and its Contractors' forces to other work, as appropriate.

4.1.2 Performance, Design and Construction Standards

4.1.2.1 Developer shall perform the D&C Work in accordance with (a) Best Management Practice, (b) the requirements, terms, conditions and standards set forth in the Contract Documents, (c) the Project Management Plan, (d) all Laws, and (e) the requirements, terms, conditions and standards set forth in all Governmental Approvals. If Developer encounters a contradiction between subsections (a) through (e), Developer shall advise the Department of the contradiction and the Department shall instruct Developer as which subsection shall control in that instance.

4.1.2.2 The Department has approved the standards and specifications for Project design set forth in the Technical Requirements. Developer shall not deviate from such standards and specifications except through a Department-approved Change Proposal. The Department's approval of such standards and specifications, and of deviations therefrom, shall constitute approval for purposes of California Government Code Section 830.6.

4.1.2.3 Developer shall use reasonable care to identify any provisions in the Technical Requirements that are erroneous, create a potentially unsafe condition, or are or become inconsistent with Best Management Practice. Whenever Developer knows or, in the exercise of reasonable care should have known that a provision of the Technical Requirements is erroneous, creates a potentially unsafe condition or is or becomes inconsistent with Best Management Practice, Developer shall have the duty to notify the Department in writing of such fact and of the changes to the provision that Developer believes are the minimum necessary to render it correct, safe and consistent with Best Management Practice. If Developer commences or continues any D&C Work affected by the change after the need for the change was identified, or should have been identified through the exercise of reasonable care, Developer shall bear the risk of loss and any additional costs associated with redoing the Work already performed in accordance with the Contract Documents.

4.1.2.4 References in the Technical Requirements to the Manuals and Guidelines or other publications governing the D&C Work prior to Substantial Completion shall mean the most recent editions in effect as of the date the Department issued the RFP, unless expressly provided otherwise.

4.1.2.5 The Parties anticipate that from time to time after the Department issues the RFP the Department will adopt, through revisions to the existing Manuals and Guidelines or through new manuals and publications, changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions relating to the D&C Work of general application to comparable Department projects. Pursuant to Section 10.1 and subject to Section 8.2.1, the Department shall have the right to add such changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions to the Technical Requirements in accordance with the Contract Documents.

4.2 Project Management Plan; Design Implementation

4.2.1 Developer is responsible for all quality assurance and quality control activities necessary to manage the Work, including the Developer's Utility Adjustment Work. Developer shall undertake all aspects of quality assurance and quality control for the Project and Work in accordance with the approved Project Management Plan and Best Management Practice.

4.2.2 Developer shall develop the Project Management Plan and its component parts, plans and other documentation in accordance with the Proposal, the requirements set forth in [Section ___ of Division ___] and Best Management Practice. Developer is authorized to commence or continue work on the Project Management Plan from and after the Effective Date.

4.2.3 Developer shall submit to the Department for approval in its good faith discretion in accordance with the procedures and time periods set forth in Section 3.3 each component part, plan and other documentation of the Project Management Plan and any proposed changes or additions to or revisions of any such component part, plan or other documentation. Each component part, plan and other documentation of the Project Management Plan and each proposed change or addition to or revision of any such component part, plan or other documentation shall constitute a separate Submittal for purposes of Section 3.3.8. The Department may propose any change required to comply with Best Management Practice or to reflect a change in working practice to be implemented by Developer.

4.2.4 Developer shall not commence or permit the commencement of any aspect of the design, construction, tolling, operation or maintenance before the Project Management Plan has been submitted to and approved by the Department.

4.2.5 If any part, plan or other documentation of the Project Management Plan refers to, relies on or incorporates any manual, plan, procedure or like document then all such referenced or incorporated materials shall be submitted to the Department for approval in its good faith discretion at the time that the relevant part, plan or other documentation of the Project Management Plan or change, addition or revision to the Project Management Plan is submitted to the Department.

4.2.6 Developer shall carry out internal audits of the Project Management Plan at the times prescribed in the Project Management Plan.

4.2.7 Developer shall cause each of its Contractors at every level to comply with the applicable requirements of the approved Project Management Plan.

4.2.8 The Quality Manager shall, irrespective of his/her other responsibilities, have defined authority for ensuring the establishment and maintenance of the Project Management Plan and reporting to the Department on the performance of the Project Management Plan.

4.2.9 Developer, through the appropriately qualified and licensed design professionals identified in Developer's Project Management Plan, shall prepare designs, plans and specifications in accordance with the Contract Documents.

4.3 Nonconforming and Defective Work

4.3.1 As directed by the Department in its sole discretion and as specified in the Contract Documents, the Developer shall be responsible for removing, replacing and otherwise correcting Nonconforming Work discovered by the Department. If the Department elects to accept Nonconforming Work, the Department may recover from Developer 100% of the cost savings of Developer or the Lead Contractor associated with its failure to perform the Work in accordance with requirements of the Contract Documents (in addition to any other adjustment of Milestone Payments or Availability Payments).

4.3.2 Subject to Section 18.2.13, nothing contained in the Contract Documents shall in any way limit the right of the Department to assert claims for damages resulting from patent or latent defects in the Work for the period of limitations prescribed by applicable Law, and the foregoing shall be in addition to any other rights or remedies the Department may have hereunder or under Law.

4.4 Project Right of Way Acquisition

4.4.1 The Project shall be situated entirely within the Project Right of Way as provided in Appendix 5-A, all of which is owned by the Department, the Presidio Trust or the Golden Gate Bridge, Highway and Transportation District; provided the Parties hereby acknowledge that the rehabilitation or replacement work relating to the outfall facility will take place on lands owned by the National Parks Service. The current location of the drainage outfall is included in Appendix 5-A.

4.4.2 If Developer identifies additional Project Right of Way or other lands or property rights beyond that identified in Appendix 5-A or 5-D as permanently needed to construct or maintain the Phase II Construction, Developer shall be responsible for all costs it or the Department incurs in the acquisition of the additional Project Right of Way or other lands or property rights, and shall bear the sole risk and cost of any time and cost impacts to the Work related to such acquisition. Developer shall submit to the Department in writing any requests Developer may have for any such additional Project Right of Way. As a matter of information only and not as a binding representation, Developer should not anticipate such additional Project Right of Way being made available to Developer any earlier than [18] months after receipt by the Department of Developer's drawing of survey and legal documents for each desired parcel. The Department undertakes no obligation to complete acquisition within such [18]-month period.

4.4.3 From and after issuance of NTP2, Developer shall have the right to use the Staging Areas (as shown in Appendix 5-B), subject to the applicable terms and conditions of Presidio Trust Right of Entry Agreement (including duration of use) and of the Contract Documents. Developer, at its sole cost, shall be solely responsible for obtaining title to, leases of or temporary permits for any additional construction staging, lay down, storage and

stockpiling areas that Developer desires. Developer shall conduct any such acquisition in accordance with the Contract Documents and applicable Law. All such acquired real property rights, titles and interests shall be vested in the Department unless the Department otherwise indicates in writing in its sole discretion.

4.4.4 Developer shall not enter any portion of the Project Right of Way, including any additional Project Right of Way or other property, for the purpose of construction staging, lay down, storage or stockpiling activities, or starting any demolition, site preparation or other Construction Work, until the Department issues NTP2.

4.4.5 All Project construction activities (other than construction staging, lay down, storage and stockpiling in additional areas Developer may acquire) must be conducted within the Project Right of Way..

4.5 Utility Adjustments

4.5.1 Department's General Responsibilities

4.5.1.1 The Department shall be responsible for coordinating and causing Utility Adjustments within the Project Right of Way, except for (a) Service Lines, (b) Utilities within any additional Project Right of Way or other lands Developer obtains or uses for construction of the Phase II Construction, (c) Utility Adjustments to provide Utility service facilities required to carry out the D&C Work and operate and maintain the Project, and (d) Unknown Utilities. The Department has pursued Utility Adjustment Work within the Project Right of Way prior to the Effective Date and may continue such work until issuance of NTP2.

4.5.1.2 Developer acknowledges it has received and is familiar with the Utility Information, which identifies all known Utilities and their locations based upon completion of the Utility Adjustment Work by the Department. Developer acknowledges that the Utilities and Utility locations shown in the Utility Information are compatible with and will accommodate Developer's design and construction of the Phase II Construction and Developer's operation, maintenance and/or use of the Project and the Work.

4.5.2 Developer's General Responsibilities

4.5.2.1 Developer shall be responsible for coordinating and causing all Utility Adjustments not the responsibility of the Department under Section 4.5.1 necessary for the timely construction, operation and maintenance of the Project in accordance with the Contract Documents. Developer shall ensure that all such Utility Adjustments, whether performed by Developer or a Utility Owner, complies with the Contract Documents and applicable Utility Agreement. Except with respect to Developer's rights to claim a Relief Event for Utility Owner Delays pursuant to Section 4.5.8 and Unknown Utilities and pursuant to Section 4.5.9, Developer shall not be entitled to submit a claim for Extra Work Costs, Delay Costs, time or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief related to the Utility Adjustment Work, inaccuracy of the Utility Information, or Utilities located within or outside the Project Right of Way or otherwise impacted by, or having an impact on, the Project or the Work.

4.5.2.2 If a Utility Owner performs all or any part of the Utility Adjustment for which Developer is responsible, Developer shall coordinate, monitor, and otherwise

undertake the necessary efforts to enable such Utility Owner to perform such work timely, in coordination with the Work, and in compliance with the Contract Documents and applicable Utility Agreement.

4.5.2.3 The Department will endeavor to cooperate with Developer with respect to Developer's contractual obligations for coordinating with Utility Owners. Notwithstanding the foregoing, Developer shall be solely responsible for performing its obligations under the Contract Documents related to Utility Adjustment Work and such cooperation or failure to cooperate by the Department shall not relieve Developer from fulfilling such obligations.

4.5.3 Utility Agreements

Developer shall be responsible for negotiating, preparing and executing Utility Agreements to accomplish the Utility Adjustments for which Developer is responsible under Section 4.5.2. The Department agrees to cooperate as reasonably requested by Developer in pursuing any such Utility Agreements. All such Utility Agreements shall be: (a) reasonably acceptable to the Department; (b) consistent with the requirements of the Contract Documents related to the applicable Utility Adjustment; and (c) submitted to the Department as provided in [Section ___ of Division ___].

4.5.4 Utility Adjustment Costs

4.5.4.1 Except for Betterment costs which are the responsibility of the Utility Owner, and subject to Developer's rights to claim a Relief Event for Utility Owner Delays pursuant to Section 4.5.8 and Unknown Utilities pursuant to Section 4.5.9, Developer is responsible for all costs of the Utility Adjustment Work for which Developer is responsible under Section 4.5.2. Developer shall fulfill this responsibility either by performing the Utility Adjustments Work itself at its own cost, or by reimbursing the Utility Owner for the Utility Adjustment Work. Developer is solely responsible for collecting directly from the Utility Owner any reimbursement due for Betterment costs or other costs for which the Utility Owner is considered responsible under applicable Law.

4.5.4.2 If for any reason Developer is unable to collect any amounts due to Developer from any Utility Owner, then (a) the Department shall have no liability for such amounts, (b) Developer shall have no right to collect such amounts from the Department or to offset such amounts against amounts otherwise owing from Developer to the Department, and (c) Developer shall have no right to suspend the Work or to exercise any other remedies against the Department on account of such failure to pay.

4.5.4.3 For each Utility Adjustment for which Developer is responsible, Developer shall maintain or cause a Utility Owner to maintain cost records in accordance with the recordkeeping and audit requirements of the Contract Documents and applicable Law, including 23 CFR Part 645, Subpart A. Developer shall obtain from the Utility Owner a complete set of records of the Utility Owner's costs incurred for such Utility Adjustment Work. All records maintained pursuant to this Section 4.5.4.3 shall be in a format compatible with any related estimates and in sufficient detail for analysis. For both Utility Owner costs and Developer costs, the totals for each cost category shall be shown in such manner as to permit comparison with the categories stated on the estimate.

4.5.5 Utility Enhancements

With respect to Utility Adjustments for which Developer is responsible, Developer shall respond to any requests by Utility Owners that Developer design and/or construct Betterments or Utility Owner Projects (collectively, "**Utility Enhancements**"), although Developer is not required to agree to such requests. Any Betterment performed as part of such a Utility Adjustment, whether by Developer or by the Utility Owner, shall be subject to the requirements of this Section 4.5 as if it were a Utility Adjustment. Developer shall perform any work on a Utility Owner Project only by separate contract outside of the Work. Any proposed Utility Enhancement shall be subject to the Department's prior approval. Under no circumstances shall Developer proceed with any Utility Enhancement that is incompatible with the Project or is not in compliance with the Contract Documents. Developer shall not be entitled to any Extra Work Costs, Delay Costs, time or Completion Deadline extension, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief as the result of any Utility Enhancement, whether performed by Developer or by the Utility Owner, and shall be responsible for and liable to the Department for any deficiencies relating to any Utility Enhancements.

4.5.6 Utility Permit Applications

For reasons unrelated to a Utility Adjustment, it is anticipated that from time to time during the Construction Work, Utility Owners might apply for utility permits to install new Utilities that would cross or longitudinally occupy those areas of the Project that are subject to the Department's permitting jurisdiction, or to modify, upgrade, relocate or expand existing Utilities within such areas. For such utility permit applications pending as of or submitted after the Effective Date, Developer shall assist the Department in its consideration of each utility permit application in accordance with the Contract Documents. Further, Developer shall make available upon request the most recent Project design information and/or As-Built Record Plans, as applicable, to the applicants, shall assist each applicant with information regarding the location of other proposed and existing Utilities, and shall use commercially reasonable efforts to coordinate work schedules with such applicants as appropriate to avoid interference with the Project Schedule by their activities.

4.5.7 Assignment of Rights Against Utility Owners

In the event of good-faith and bona fide colorable potential claims on behalf of Developer for wrongful actions or inactions of a Utility Owner within the Project Right of Way, the Department agrees that, upon receipt of a written request from Developer, the Department in its reasonable discretion will assign to Developer the Department's rights of recovery, as such may exist, under any existing agreement between the Department and a Utility Owner, including any utility permits, utility relocation agreements, or other agreements.

4.5.8 Utility Owner Delay

4.5.8.1 Developer shall be entitled to seek compensation and performance relief under Sections 9.2.2, 9.2.3 and 9.2.5 for a Utility Owner Delay, provided that all of the following conditions have been met:

1. A Qualifying Utility Agreement exists between Developer and the Qualifying Utility Owner; and

2. Developer has established by evidence reasonably satisfactory to the Department that: (a) the subject Utility Adjustment is necessary and Developer has provided a reasonable plan for same to the Qualifying Utility Owner, (b) the time for completion of the Utility Adjustment in the Project Schedule is reasonable, (c) Developer has complied with its obligations to coordinate with the Qualifying Utility Owner under the Contract Documents, including [Section __ of Division __], (d) Developer has furnished the Qualifying Utility Owner and the Department with sufficient advance notice regarding the potential impact of the Utility Owner Delay, and (e) Developer has pursued all commercially reasonable options to avoid the Utility Owner Delay, including the enforcement of any rights that Developer may have against the Qualifying Utility Owner under the Qualifying Utility Agreement.

4.5.8.2 Notwithstanding the provisions in this Section 4.5.8, Developer shall not be entitled to any relief relating to a Utility Owner Delay for the following:

1. Extra Work Costs.
2. Delay Costs of any kind.
3. Utility Owner Delays that could have been mitigated by Developer through reasonable efforts.

4.5.9 Unknown Utilities

The discovery of Unknown Utilities during the initial construction of the Phase II Construction is a Relief Event which may entitle Developer to compensation, Completion Deadline extension, performance relief and other relief as provided in Article 9.

4.5.10 Utility Services

Developer is responsible to provide all Utility service facilities (both on-Site and off-Site) required to carry out the D&C Work and operate and maintain the Project. The services include power (including power supply to the tunnel substations), gas, communications, water, sewage and drainage. Except for incremental additional costs directly attributable to a Relief Event, Developer is responsible for all costs of such Utility service facilities and Utility services, including costs of design and construction (both on-Site and off-Site), Governmental Approvals, connection fees, testing, inspection, and certification, and Utility service/usage fees and charges.

4.6 Conditions to Commencement of Design Work

Within five days after satisfaction of the conditions set forth in this Section 4.6, the Department shall issue NTP 1 to Developer authorizing commencement of the Design Work. Any Design Work performed by Developer prior to issuance of NTP 1 shall be at Developer's sole risk and expense. The conditions to the Department's issuance of NTP 1 are:

4.6.1 The Performance Security and Payment Security required under Section 16.2.1.1 and Section 16.2.2.1, respectively, have been obtained and are in full force and effect, and Developer has delivered to the Department, as applicable, either the original Performance Security and Payment Security or, if the original has been delivered to the Collateral Agent, a

certified and conformed copies of the originals including, in the case of a letter of credit, the related documentation required under Section 16.2.2.5 or, in the case of bonds, the multiple obligee rider;

4.6.2 Insurance Policies required under Section 16.1 and Appendix 9 for the Design Work have been obtained and are in full force and effect, and Developer has delivered to the Department written binders of insurance, in form and content set forth in Section 16.1.2.4, verifying coverage from the relevant Insurers of such Insurance Policies;

4.6.3 Developer has caused to be developed and delivered to the Department and the Department has approved or accepted Developer's Project Schedule for the Design Work

4.6.4 Developer has caused to be developed and delivered to the Department and the Department has approved or accepted in its good faith discretion Developer's Project Management Plan; and

4.6.5 All representations and warranties of Developer set forth in this Agreement and the Key Contracts to which Developer is a party shall be and remain true and correct.

4.7 Conditions to Commencement of Construction Work

Developer shall not commence or permit commencement of the Construction Work, or any portion thereof, until the Department's issuance of NTP 2 for the Construction Work. The Department shall issue NTP 2 within five days after all of the conditions in this Section 4.7 have been satisfied:

4.7.1 Developer has achieved Financial Close;

4.7.2 The Performance Security and Payment Security required under Sections 16.2.1.2 and 16.2.3.2, respectively, have been obtained and are in full force and effect, and Developer has delivered to the Department, as applicable, either the original Performance Security and Payment Security or, if the original has been delivered to the Collateral Agent, a certified and conformed copies of the originals including, in the case of a letter of credit, the related documentation required under Section 16.2.2.5 or, in the case of bonds, the multiple obligee rider;

4.7.3 All Insurance Policies required under Section 16.1 and Appendix 9 for the Construction Work and O&M Work have been obtained and are in full force and effect, and Developer has delivered to the Department (a) written binders of insurance, in form and content set forth in Section 16.1.2.4, verifying coverage from the relevant Insurers of such Insurance Policies, and (b) proof that all eligible Contractors that are scheduled to commence performance of Construction Work within the next 90 days after issuance of NTP2 have completed their enrollment in the OCIP according to the enrollment procedures set forth in the OCIP Manual;

4.7.4 All Governmental Approvals and other third-party approvals necessary to begin the applicable portions of the Construction Work and O&M Work have been obtained, Developer has furnished to the Department fully executed copies of such Governmental Approvals, and there exists no uncured material violation of the terms and conditions of any such Governmental Approval or other third-party approval;

4.7.5 Developer has satisfied all applicable pre-construction requirements contained in

the NEPA/CEQA Approval and other Governmental Approvals for the applicable portion of the Construction Work;

4.7.6 Developer has caused to be developed and delivered to the Department and the Department has approved or accepted Developer's Project Schedule for the Construction Work, the Construction Quality Plan, the Vibration Monitoring Plan and O&M Plan and all component parts thereof;

4.7.7 Developer demonstrates to the Department's reasonable satisfaction that Developer has completed training of operations and maintenance personnel, which demonstration shall consist of (a) delivery to the Department of a written certificate, in form acceptable to the Department, executed by Developer that it and its Contractors are fully staffed with such trained personnel and are ready, willing and able to perform the O&M Work during the Construction Period in accordance with the terms and conditions of the Contract Documents and Project Management Plan, (b) delivery to the Department of training records and course completion certificates issued to each of the subject personnel and (c) the Department's verification that the training program and number of trained personnel meet the standards in [Section __ of Division __]

4.7.8 Developer has adopted written policies establishing ethical standards of conduct for all Developer-Related Entities, including Developer's supervisory and management personnel in dealing with (a) the Department and (b) employment relations, in accordance with Section 7.7;

4.7.9 Developer has provided a fully functional field office as set forth in [Section __ of Division __];

4.7.10 Developer has satisfied all other requirements of the Contract Documents that are required to be satisfied prior to commencement of the applicable portion of the Construction Work and O&M Work, including delivery to the Department of all Submittals relating to the applicable portion of the Construction Work and O&M Work required by the Project Management Plan or Contract Documents, in the form and content required by the Project Management Plan or Contract Documents;

4.7.11 All representations and warranties of Developer set forth in this Agreement and the Key Contracts to which Developer is a party shall be and remain true and correct;

4.7.12 Developer is not then in receipt of any notice of Developer Default from the Department unless any such default has been cured;

4.7.13 Developer is not then in receipt of any notice of default from any Lender unless any such noticed default has been cured, and no Lender has otherwise indicated that it is unwilling or unable to presently fund Developer's costs of the D&C Work and O&M Work; and

4.7.14 The Department has achieved Phase I Substantial Completion.

4.8 Construction Commencement Deadline and Project Schedule

4.8.1 Developer shall commence the Construction Work no later than the Construction Commencement Deadline.

4.8.2 Developer shall perform the D&C Work in accordance with the Project Schedule. Each Project Schedule submission and update shall comply with [Section ___ of Division ___ and other provisions set forth in the Technical Requirements].

4.9 Substantial Completion and Final Acceptance

4.9.1 Substantial Completion

Developer shall exercise its best efforts to achieve Substantial Completion on or before the Scheduled Substantial Completion Date. Failure to achieve Substantial Completion by the Long Stop Date is a Developer Default under Section 18.1.

4.9.2 Conditions to Substantial Completion

4.9.2.1 The Department will issue a notice of Substantial Completion upon satisfaction of all the following conditions for the entire Project:

1. Developer has completed the design and construction of the Phase II Construction in accordance with the Contract Documents, including all Project equipment required to be installed and commissioned by Developer, except for (a) Punch List items the existence and completion of which will not adversely affect normal and safe use and operation of the Project, and (b) the Construction Work identified in [Section ___ of Division ___];
2. All lanes of traffic, ramps, and points of entry and exit as set forth in the Design Documents are in their final configuration and Developer has certified that such lanes, ramps, and entry and exit points can be opened to traffic;
3. The relevant systems and equipment installed by Developer have passed the tests required under the Contract Documents and Developer has delivered to the Department all reports, data and documentation relating to such tests;
4. All Utility Adjustment Work and other work that Developer is obligated to perform for or on behalf of third parties as required by the Contract Documents complies with the requirements of the applicable agreements with such third parties, and Developer has paid for all work by third parties that Developer is obligated to pay for, other than disputed amounts;
5. Developer has received, and paid all associated fees due and owing for, all applicable Governmental Approvals and other third-party approvals required for use and operation of the Project, and there exists no uncured violation of the terms and conditions of any such Governmental Approval or other third-party approvals;
6. All plans, manuals and reports for the O&M Work to be performed during the Operating Period have been submitted and accepted by the Department as required under the Contract Documents;
7. Developer has made all deposits to the Intellectual Property Escrow required at or prior to Substantial Completion pursuant to Section 21.5;

8. There exist no uncured Developer Defaults (except any Developer Default which will be cured by achieving Substantial Completion);
9. All Insurance Policies required under Section 16.1 and Appendix 9 for the O&M Work during the Operating Period have been obtained and are in full force and effect, and Developer has delivered to the Department written binders of insurance verifying coverage from the relevant Insurers of such Insurance Policies;
10. Developer demonstrates to the Department's reasonable satisfaction that Developer has completed training of operations and maintenance personnel required for the O&M Work during the Operating Period, which demonstration shall consist of (a) delivery to the Department of a written certificate, in form acceptable to the Department, executed by Developer that it and its Contractors are fully staffed with such trained personnel and are ready, willing and able to perform the O&M Work during the Operating Period in accordance with the terms and conditions of the Contract Documents and Project Management Plan, (b) delivery to the Department of training records and course completion certificates issued to each of the subject personnel and (c) the Department's verification that the training program and number of trained personnel meet the standards in [Section ___ of Division ___]; and
11. Developer has prepared and submitted the Punch List in accordance with the procedures and schedules set forth in the Project Management Plan.

4.9.2.2 Approximately [60] days prior to the date on which Developer expects to achieve Substantial Completion, Developer shall provide written notice to the Department so as to allow the Department to promptly commence its review of those conditions to Substantial Completion amenable to being reviewed at the time of the notice. Following the date Developer determines it has achieved Substantial Completion, Developer shall provide the Department with written notification of such date. During the [14]-day period following receipt of such notice, Developer and the Department shall meet and confer to facilitate the Department's determination of whether Developer has met the criteria for Substantial Completion.

4.9.2.3 Within [14] days following such meeting, the Department shall conduct an inspection of the Project and its components, a review of the Final Design Documents, Construction Documents, other Submittals and such other investigation as may be necessary to evaluate whether Substantial Completion is achieved.

4.9.2.4 Within the [14]-day period described in Section 4.9.2.3, the Department shall either (a) issue the written notice of Substantial Completion, effective as of the date that the conditions to Substantial Completion were actually satisfied; or (b) notify Developer in writing of the reasons why Substantial Completion has not been achieved. If the Department and Developer cannot agree as to the date of Substantial Completion, such Dispute shall be resolved according to the Dispute Resolution Procedures; provided, however, that the Parties may proceed directly to the Disputes Review Board and need not comply with subsections 1 through 4 as described in Section 24.2.1.

4.9.2.5 In connection with the Department's issuance of the notice of Substantial Completion, the Department shall have the right in its reasonable discretion to add

items to the Punch List to address incomplete work or work in need of repair. Any Dispute regarding whether an item added by the Department is appropriately included on the Punch List shall be resolved according to the Dispute Resolution Procedures. The notice of Substantial Completion will indicate the actual date on which Developer achieved Substantial Completion.

4.9.3 Final Acceptance

4.9.3.1 Developer shall achieve Final Acceptance by the Final Acceptance Deadline. The Department will issue a written notice of Final Acceptance at such time as all of the following have occurred for the entire Project:

1. All Construction Work has been completed in accordance with the Design Documents and the Contract Documents;
2. All Punch List items, including in connection with the Construction Work identified in [Section ____ of Division ____], have been completed to the reasonable satisfaction of the Department;
3. All landscaping features have been completed in accordance with the Design Documents and the Contract Documents and accepted by the Presidio Trust;
4. Developer has cleared and restored to their original condition the Staging Areas and any other Presidio Trust lands and properties made available to Developer for temporary access and activities during the D&C Work.
5. Developer demonstrates to the Department's reasonable satisfaction that Developer has acquired and properly stored, or arranged for immediate availability, a reasonable inventory of all spare parts, spare components, spare equipment, special tools, materials, expendables and consumables necessary for operation and maintenance of the Project as identified in the O&M Plan for the Operating Period;
6. All Submittals for the D&C Work that Developer is required by the Contract Documents to submit after Substantial Completion have been submitted to the Department;
7. The Department has received a complete set of the As-Built Record Plans in the form required by the Contract Documents and the As-Built Schedule required under [Section ____ of Division ____];
8. If any Governmental Entity with jurisdiction requires any form of certification of design, engineering or construction with respect to the Project or any portion thereof, including any certifications from the Engineer of Record and Architect of Record for the Project, Developer has caused such certificates to be delivered and has concurrently issued identical certificates to the Department;
9. Developer has properly completed and the Department has received the OCIP notice of work completion form; and

10. There exist no uncured Developer Defaults (except any Developer Default which will be cured by achieving Final Acceptance).

4.9.3.2 Following the date Developer determines it has achieved Final Acceptance, Developer shall provide the Department with written notification of such date. During the [20]-day period following receipt of such notification, Developer and the Department shall meet and confer to facilitate the Department's determination of whether to issue a written notice of Final Acceptance.

4.9.3.3 Within [20] days following such meeting, the Department shall conduct an inspection of the Punch List items, a review of the As-Built Record Plans, other Submittals and such other investigation as may be necessary to evaluate whether Final Acceptance is achieved.

4.9.3.4 Within the [20]-day period described in Section 4.9.3.3, the Department shall either (a) issue a notice of Final Acceptance effective as of the date that the conditions to Final Acceptance were actually satisfied; or (b) notify Developer in writing of the reasons why Final Acceptance has not been achieved. If the Department and Developer cannot agree as to the date of Final Acceptance, such Dispute shall be resolved according to the Dispute Resolution Procedures; provided, however, that the Parties may proceed directly to the Disputes Review Board and need not comply with subsections 1 through 4 as described in Section 24.2.1. The notice of Final Acceptance will indicate the actual date on which Developer achieved Final Acceptance.

4.9.4 Milestone Payments and Adjustments

4.9.4.1 Subject to the adjustments described in Section 4.9.4.3, Developer shall be entitled to receive from the Department the payments ("**Milestone Payments**") in the amounts set for in Appendix 4. Milestone Payments are payments chosen to be made by the Department as an economic measure in lieu of larger Availability Payments, in order to maximize the overall value to the Department of this Agreement, and are not intended and shall not be construed as progress payments or retention under California Law.

4.9.4.2 Developer shall submit an invoice in a format acceptable to the Department's chief financial officer for the applicable Milestone Payment. The Department shall make payment to Developer of the applicable Milestone Payment within 30 days after the Department receives (a) the invoice in the proper format issued on or after the applicable date specified in Appendix 4 and (b) Developer's written report on determination of adjustments to such Milestone Payment pursuant to Section 4.9.4.3 and Appendix 4-B to the Agreement.

4.9.4.3 The Milestone Payments shall be subject to adjustment in accordance with Appendix 4-B of the Agreement. Developer acknowledges that such adjustments to the Milestone Payments are reasonable liquidated damages in order to compensate the Department for damages it will incur by reason of Developer's failure to comply with the performance standards for O&M Work applicable to the period prior to Substantial Completion. Such damages include:

1. The Department's increased costs of administering this Agreement, including the increased costs of legal, accounting, monitoring, oversight and overhead, and could also include obligations to pay or reimburse Governmental Entities with regulatory jurisdiction over the Project for violation of applicable

Governmental Approvals or for their increased costs of monitoring and enforcing Developer's compliance with applicable Governmental Approvals;

2. Potential harm and future costs to the Department from reduction in the condition and useful life of the Project;
3. Potential harm to the credibility and reputation of the Department's transportation improvement program with other Governmental Entities, with policy makers and with the general public who depend on and expect availability of service;
4. Potential harm and detriment to the general public, which may include loss of the use, enjoyment and benefit of the Project and of facilities connecting to the Project;
5. Loss of economic benefits by other Governmental Entities owning and operating transportation facilities that connect to or are affected by the Project; and
6. The Department's increased costs of addressing potential harm to the Environment, including increased harm to air quality caused by congestion, and harm to water quality, soils conditions, historic structures and other environmental resources caused by adjustment factors set forth in Appendix 4-B.

4.9.4.4 Developer further acknowledges that these damages would be difficult and impracticable to measure and prove because, among other things, (a) the Project is of a unique nature and no substitute for it is available; (b) the costs of monitoring and oversight prior to increases in the level thereof will be variable and extremely difficult to quantify; (c) the nature and level of increased monitoring and oversight will be variable depending on the circumstances; and (d) the variety of factors that influence use of and demand for the Project make it difficult to sort out causation of the matters that will trigger these liquidated damages and to quantify actual damages.

4.9.4.5 Each Milestone Payment is also subject to deduction and offset as provided in Section 18.2.5.2.

4.10 Hazardous Materials and Undesirable Materials Management

4.10.1 Developer's General Responsibilities

4.10.1.1 Developer shall manage, treat, handle, store, remediate, remove, transport (where applicable) and dispose of all Hazardous Materials or Undesirable Materials encountered in performing the Work, including contaminated soil and groundwater, in accordance with applicable Law, Governmental Approvals, and all applicable provisions of the Contract Documents, including [Section __ of Division __]. If during the course of the Work, a Release of Hazardous Materials occurs or Developer otherwise encounters Hazardous Materials or Undesirable Materials, Developer shall follow the procedures and perform the activities as set forth in the Contract Documents.

4.10.1.2 Except as set forth in Sections 4.10.2 and 4.10.3, Developer shall

not be entitled to submit a claim for any Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions or other relief associated with discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting or disposing of Hazardous Materials or Undesirable Materials, including contaminated soil and groundwater.

4.10.2 Pre-existing Hazardous Materials

4.10.2.1 Developer shall be solely responsible for all costs, including Extra Work Costs and Delay Costs, relating to Pre-existing Hazardous Materials, except that Developer and the Department shall allocate the risk of Extra Work Costs as follows:

1. The first US\$_____ of Extra Work Costs ("**Pre-existing Hazardous Materials Deductible**") directly attributable to discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting and disposing of Pre-existing Hazardous Materials shall be borne solely by Developer.
2. The next US\$_____ of Extra Work Costs ("**Tiered Pre-existing Hazardous Materials Deductible**") directly attributable to discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting and disposing of Pre-existing Hazardous Materials shall be borne [50]% by Developer and [50]% by the Department.
3. The Department shall compensate Developer for [100]% of the Extra Work Costs directly attributable to discovering, encountering, managing, treating, handling, storing, remediating, removing, transporting and disposing of Pre-existing Hazardous Materials in excess of the Tiered Pre-existing Hazardous Materials Deductible.

4.10.2.2 Developer shall not be entitled to seek, nor shall Developer be entitled to charge against any of the deductibles established under Section 4.10.2.1, the following:

1. Extra Work Costs covered by insurance obtained for the Project;
2. Extra Work Costs that could have been avoided by the exercise of reasonable efforts to mitigate and reduce costs;
3. Extra Work Costs associated with the investigation of and planning for Pre-existing Hazardous Materials prior to the completion of the Final Design;
4. Delay Costs of any kind.

4.10.2.3 The remaining amounts of the Pre-existing Hazardous Materials Deductible and the Tiered Pre-existing Hazardous Materials Deductible shall be adjusted in accordance with Section 9.1.4.

4.10.2.4 Nothing in this Section 4.10.2 shall prejudice Developer's right to seek compensation, Completion Deadline extension and performance relief under Sections 9.2.2, 9.2.3 and 9.2.5.

4.10.2.5 To the extent permitted by Law, the Department agrees to hold harmless and indemnify Developer for Losses arising out of or related to Third-Party Claims with respect to Pre-existing Hazardous Materials discovered or encountered by Developer during the performance of the Work, provided that: (a) the Pre-existing Hazardous Materials were not known or reasonably discoverable by Developer or any Developer-Related Entity and (b) such Losses were not the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity.

4.10.3 Releases of Hazardous Materials

For Releases of Hazardous Materials as set forth in clause (n) of the definition of Relief Event by a third party who is not a Developer-Related Entity, Developer shall be entitled to seek compensation, Completion Deadline extension and performance relief under Sections 9.2.2, 9.2.3 and 9.2.5. In no event shall Developer be entitled to Extra Work Costs or Delay Costs for such Releases of Hazardous Materials. For Releases of Hazardous Materials by the Department as set forth in clause (n) of the definition of Relief Event, Developer shall be entitled to submit a claim for compensation, Completion Deadline extensions, performance relief and other relief permitted under Article 9.

4.10.4 Generator of Hazardous Materials

4.10.4.1 As between Developer and the Department, the Department shall be considered the sole generator of Pre-existing Hazardous Materials and Hazardous Materials as set forth in clause (n) of the definition of Relief Event, provided that such Pre-existing Hazardous Materials or Hazardous Materials as set forth in clause (n) of the definition of Relief Event are handled and disposed of by Developer in accordance with the Contract Documents. The Department has exclusive decision-making authority regarding selection of the destination facility to which the Pre-existing Hazardous Materials or Hazardous Materials as set forth in clause (n) of the definition of Relief Event will be transported. The foregoing shall not preclude or limit any rights or remedies that the Department may have against Developer-Related Entities (other than Developer), third parties and/or prior owners, lessees, licensees and occupants of the Project Right of Way.

4.10.4.2 As between Developer and the Department, Developer shall be considered the sole generator for Hazardous Materials that are other than Pre-existing Hazardous Materials and other than Hazardous Materials as set forth in clause (n) of the definition of Relief Event. The foregoing shall not preclude or limit any rights or remedies that Developer may have against any Governmental Entity or any other third parties, including prior owners, lessees, licensees and occupants of any parcel of land that is or becomes part of the Project Right of Way, excluding, however, the Department, the Authority and their respective agents.

4.10.5 Assignment and Subrogation of Rights Against Third Parties

In the event of good-faith and bona fide claims on behalf of Developer related to Releases of Hazardous Materials by a third party who is not a Developer-Related Entity, the Department agrees that, upon receipt of a written request from Developer, the Department in its reasonable discretion will assign and subrogate its rights of recovery to Developer, as such may exist.

4.11 Environmental Compliance

Throughout the course of the D&C Work, Developer shall comply with all Environmental Laws and perform or cause to be performed all environmental mitigation measures required under the Contract Documents and the Environmental Approvals, including the NEPA/CEQA Approval, the approvals and consents obtained under the Programmatic Agreement and similar Governmental Approvals for the D&C Work, and shall comply with all other conditions and requirements thereof. Developer, at its sole cost and expense, shall also abide by and comply with the commitments contained in the [EIR/EIS] and subsequent re-evaluations that are submitted [30] days prior to the Proposal Submittal Date which may identify additional commitments. If the Department directs Developer to comply with commitments contained in re-evaluations submitted after such [30]-day period that affect the D&C Work, such directive shall be deemed a Department Change. Notwithstanding the foregoing, Developer shall be responsible, and bear the sole risk for any costs and delays, for complying with any environmental re-evaluations or modifications in the approvals and consents obtained under the Programmatic Agreement that are required due to differences between the Indicative Preliminary Design and Developer's Final Design, unless such differences are due to a Department Change.

4.12 Oversight, Meetings and Reporting

4.12.1 Oversight by the Department

The Department shall have the right but not the obligation to perform oversight and auditing relating to the D&C Work in accordance with the Contract Documents.

4.12.2 Meetings

4.12.2.1 Developer shall conduct regular progress meetings at least once a month during the Construction Period. The Department shall be invited to participate in such progress meetings. At the Department's request, Developer will require its design consultants and construction contractors to attend these progress meetings.

4.12.2.2 In addition to the regularly scheduled meetings required under the Contract Documents, the Department and Developer, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the D&C Work.

4.12.2.3 Developer shall schedule all meetings with the Department at a date, time and place reasonably convenient to both Parties and, except in cases of urgency, shall provide the Department with written notice and a meeting agenda at least [three] Business Days in advance of each meeting.

4.12.3 Reporting

Developer shall submit all reports relating to the D&C Work in the form, with the content and within the time required under the Contract Documents.

4.13 Construction Warranties

4.13.1 Developer shall obtain from all Contractors appropriate representations,

warranties, guarantees and obligations with respect to design, materials, workmanship, equipment, tools and supplies furnished by such Contractors, which shall extend not only to Developer but also to Utility Owners and any third parties for whom Work is being performed. All representations, warranties, guarantees and obligations of Contractors (a) shall be written so as to survive all Department and Utility Owner inspections, tests and approvals and (b) shall provide that upon any termination of the Agreement prior to the expiration of such representations, warranties, guarantees and obligations they shall automatically be for the benefit of and enforceable by the Department. To the extent that any Contractor warranty or guaranty would be voided by reason of Developer's negligence or failure to comply with the requirements of the Contract Documents in incorporating material or equipment into the Work, Developer shall be responsible for correcting any defects in the Work performed by such Contractor.

4.13.2 The Contractor warranties are in addition to all rights and remedies available under the Contract Documents or applicable Law, and shall not limit Developer's liability or responsibility imposed by the Contract Documents or applicable Law with respect to the Work, including liability for design defects, construction defects, strict liability, breach, negligence, willful misconduct or fraud.

4.14 Structural Defects in Phase I Construction

4.14.1 As promptly as possible after the Effective Date, without awaiting issuance of NTP1 or NTP2, and in coordination with the Department's timing for issuing a final acceptance of Phase I of the Project, Department and Developer shall complete an inspection of the Phase I Construction and agree upon a baseline asset condition report prepared by the Department that evaluates the physical condition of the Phase I Construction as of the date of such report (the "Baseline Report"). The Baseline Report shall be in the format set forth in Appendix 22. If Developer and the Department do not agree on a proposed Baseline Report within [30] days after conducting the inspection, Developer shall have [15] days to propose to the Department an alternative Baseline Report. The Department and Developer shall then meet and confer to seek to resolve the discrepancies between the Department and Developer. If the Department and Developer are unable to agree on the Baseline Report within [ten] days after the Department receives the alternative Baseline Report, either Party may refer the Dispute for resolution according to the Dispute Resolution Procedures.

4.14.2 Except as provided in Section 4.14.5, prior to the Substantial Completion Date, Department shall elect either to (a) undertake the rehabilitation or repair of any defect in the Phase I Construction identified in the Baseline Report, at its sole cost, or (b) direct Developer to undertake such rehabilitation or repair and pay Developer the cost thereof, as determined by Department and Developer using the same methodology as employed by Department for other State highway projects for similar purposes. The Baseline Report shall be revised to reflect completion of any such rehabilitation or repair.

4.14.3 Except as provided in Section 4.14.4, Developer shall be deemed to have accepted the Phase I Construction in its then current condition on the Substantial Completion Date, without right to any Extra Work Costs, Delay Costs, time or Completion Deadline extension, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other claim or relief.

4.14.4 If Developer encounters any Structural Latent Defect after the date of the

Baseline Report, Developer (a) shall be responsible for undertaking the rehabilitation of such Structural Latent Defect as well as any resulting increased costs of operating and maintaining the Project, and (b) subject to the following terms and conditions, shall be entitled to receive compensation from Department and performance relief as provided in Section 9.2:

4.14.4.1 The Structural Latent Defect must be identified and described with specificity in a written report received by Department within [3-5] years after the date of the Baseline Report;

4.14.4.2 The costs to be compensated must not be attributable to substandard maintenance and repair; and

4.14.4.3 Section 4.14.5 must not be applicable.

4.14.5 If any Developer-Related Entity is or was a contractor or subcontractor (at any tier) for Phase I Construction, then:

4.14.5.1 Developer shall be responsible for (a) undertaking the rehabilitation of any and all defects in Phase I Construction, and all damage to Phase I Construction or Phase II Construction attributable to any defects in the Phase I Construction, caused by the acts or omissions of such contractor or subcontractor, and (b) paying any resulting increased costs of operating and maintaining the Project; and

4.14.5.2 Developer shall not be entitled to any Extra Work Costs, Delay Costs, time or Completion Deadline extension, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other claim or relief for such rehabilitation or such increased costs of operating and maintaining the Project.

4.15 Assignment of Certain Causes of Action

Developer agrees to assign to the Department all rights, title, and interest in and to all causes of action Developer may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the Business and Professions Code), arising from purchases of goods, services, or materials pursuant to this Agreement. This assignment shall be made and become effective automatically upon tender of the Milestone Payments (with adjustments and deductions as permitted under this Agreement), without further acknowledgment by the Parties.

ARTICLE 5. OPERATIONS AND MAINTENANCE

5.1 Timing of O&M Work

Developer shall perform O&M Work within the Construction Period O&M Limits throughout the Construction Period, as described in Section 5.2.3, and shall perform O&M Work within the Operating Period O&M Limits throughout the Operating Period.

5.2 Operation and Maintenance Standards and Requirements

5.2.1 General Obligations

5.2.1.1 Developer shall carry out the O&M Work within the applicable O&M Limits in accordance with (a) Best Management Practice, as it evolves from time to time, (b) the requirements, terms, conditions and standards set forth in the Contract Documents as the same may change from time to time, (c) the Project Management Plan, (d) all Laws, and (e) the requirements, terms, conditions and standards set forth in all Governmental Approvals. If Developer encounters a contradiction between subsections (a) through (e), Developer shall advise the Department of the contradiction and the Department shall instruct Developer as which subsection shall control in that instance. Developer is responsible for keeping itself informed of current Best Management Practice.

5.2.1.2 In addition to performing all other requirements of the Contract Documents, Developer shall: cooperate with the Department and Governmental Entities with jurisdiction in all matters relating to the O&M Work, including their review, inspection and oversight of the operation and maintenance of the Project.

5.2.1.3 [Section ___ of Division ___] sets forth certain minimum performance requirements related to the O&M Work. Developer's failure to comply with such requirements shall entitle the Department to the rights and remedies set forth in the Contract Documents, including the assessment of Noncompliance Points, liquidated damages, deductions from payments otherwise owed to Developer, and termination for Developer Default.

5.2.2 Changes in Operation and Maintenance Standards

5.2.2.1 The Department shall have the right to adopt at any time, and Developer acknowledges it must comply with, all changes and additions to, and replacements of, the Technical Requirements relating to the O&M Work. Without limiting the foregoing, the Parties anticipate that from time to time after the Effective Date, the Department will adopt Non-Discriminatory O&M Changes that will apply to the O&M Work. Developer shall be responsible for keeping itself informed of any Non-Discriminatory O&M Changes to the Manuals and Guidelines. For any other changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other provisions to the Technical Requirements, the Department shall provide written notice to Developer, whereupon they shall constitute amendments, and become part, of the Technical Requirements. Non-Discriminatory O&M Changes that encompass matters that are addressed in the Technical Requirements as of the Effective Date shall replace and supersede inconsistent provisions of such Technical Requirements.

5.2.2.2 If a Non-Discriminatory O&M Change requires major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element, Developer shall perform the major repair, reconstruction, rehabilitation, restoration, renewal or replacement not later than the first to occur of (a) any deadline prescribed by the Department for the Non-Discriminatory O&M Change, (b) the date when Developer performs the Renewal Work on such Element; (c) the date when Developer is obligated to perform Renewal Work on such Element; and (d) provided the Department gives no less than [30] days prior written notice to Developer, the date the Department first applies the Non-Discriminatory O&M Changes to projects that the Department manages or operates. If, however, the Department adopts the Non-Discriminatory O&M Change prior to the Substantial Completion Date, the

Department shall issue a written notice informing Developer when to implement such Non-Discriminatory O&M Change. Following commencement of any Work pursuant to this Section 5.2.2.2, Developer shall diligently prosecute the Work until completion, and in any event by any deadline for completion required by the Department for such Non-Discriminatory O&M Change. Should Developer dispute the timing for commencement of Work as described in this Section 5.2.2.2, Developer may submit the Dispute for resolution according to the Dispute Resolution Procedures; pending such resolution Developer shall prosecute the Work in accordance with the Department's directive or Department Change.

5.2.2.3 If a Non-Discriminatory O&M Change requires construction or installation of new improvements at, for or on the Project, Developer shall complete construction and installation of the new improvements according to the implementation period required by the Department for such Non-Discriminatory O&M Change. Should Developer dispute the timing for commencement of Work as described in this Section 5.2.2.3, Developer may submit the issue for resolution according to the Dispute Resolution Procedures; pending such resolution Developer shall diligently prosecute the Work in accordance with the Department's directive or Department Change.

5.2.2.4 Developer shall be obligated to implement a Discriminatory O&M Change only after the Department issues a written directive or Department Change therefor pursuant to Article 10. Such directive shall indicate the schedule, if applicable, for the completion of such work required by the Discriminatory O&M Change.

5.2.2.5 For purposes of subsection (d) of Section 5.2.2.2, a change, addition or replacement shall be deemed to have been first applied by the Department when the Department commences implementing actions on any other project that the Department manages or operates.

5.2.2.6 Subject to Section 5.2.2.7, (a) for Extra Work relating to capital expenditures required by Non-Discriminatory O&M Changes (whether such Extra Work is caused by one or more Non-Discriminatory O&M Changes) occurring prior to the Substantial Completion Date, Developer shall be entitled to recover only those Extra Work Costs incurred in excess of an aggregate deductible of US\$[____], and (b) for Extra Work required by Non-Discriminatory O&M Changes (whether Extra Work is caused by one or more Non-Discriminatory O&M Changes) occurring after the Substantial Completion Date, Developer shall be entitled to recover only those Extra Work Costs incurred in excess of an aggregate deductible of US\$[____] (collectively, the **"Non-Discriminatory O&M Change Deductible"**). The Non-Discriminatory O&M Change Deductible reflects the Parties' agreement that: (a) Developer will bear the financial risks for Extra Work Costs incurred due to Non-Discriminatory O&M Changes up to the Non-Discriminatory O&M Change Deductible and (b) the Department will compensate Developer for Extra Work Costs incurred due to Non-Discriminatory O&M Changes in excess of the Non-Discriminatory O&M Change Deductible, provided that each Claim complies with [Section __ of Division __]. The Non-Discriminatory O&M Change Deductible shall be adjusted in accordance with Section 9.1.4.

5.2.2.7 In no event shall Developer be entitled to compensation for increases in costs of O&M Work, whether Extra Work Costs or Delay Costs, due to a Non-Discriminatory O&M Change, except for capital costs of required major new improvements or required major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any affected Element. Developer shall be entitled to Extra Work Costs pursuant to subsection (b) of Section 5.2.2.6 only if the Department directs Developer to implement the Non-Discriminatory

O&M Changes prior to the date when Developer performs or is scheduled to perform the Renewal Work (if any) on the affected Element or otherwise outside the ordinary course of performing the O&M Work. In such case the amount of the Extra Work Costs (for purposes of calculating both the amount to be applied against the Non-Discriminatory O&M Change Deductible and the amount to be paid by the Department) shall equal the lesser of (a) the actual, reasonable Extra Work Costs incurred or (b) the net present value (applying the discount rate used in the Financial Model for determining Equity IRR) of the cost of funds for such actual, reasonable Extra Work Costs from the date of funding until the next Renewal Work Date for the affected Element. Developer shall not be entitled to any Extra Work Costs for implementing Non-Discriminatory O&M Changes if Developer replaces the affected Element during the ordinary course of performing the O&M Work.

5.2.3 O&M Work During Construction

5.2.3.1 For O&M Work performed during the Construction Period, Developer shall be required to comply with the operations and maintenance performance standards identified in [Section ___ of Division ___].

5.2.3.2 The O&M Plan submitted by Developer shall identify the planned activities, resources and level of effort for the O&M Work to be performed during the Construction Period in accordance with [Section ___ of Division ___]. No later than [30] days prior to commencement of the Construction Work, the Parties shall review such planned activities, resources and level of effort, and Developer shall modify the O&M Plan as reasonably requested by the Department to take into account changes in Project conditions that require adjustment to the planned O&M Work.

5.2.3.3 For the O&M Work performed during ongoing Construction Work, Developer shall provide traffic management in accordance with the Contract Documents, the approved Construction Traffic Control Plan, and detour and traffic diversion plans consistent with the Construction Traffic Control Plan.

5.2.3.4 During the Construction Period Developer shall perform any O&M Work that is required, and in a manner, to ensure that the Project is maintained in a condition that poses no threat to the health or safety of any Person or physical damage to the Project.

5.2.4 Management of Hazardous Materials and Undesirable Materials

In performing the O&M Work, Developer shall perform all necessary Hazardous Materials Management and Undesirable Materials Management, including all efforts to manage, treat, handle, store, remediate, remove, transport (where applicable) and dispose of all Hazardous Materials and Undesirable Materials, including contaminated soil and groundwater, in accordance with applicable Law, Governmental Approvals and all applicable provisions of the Contract Documents. The provisions of Section 4.10 shall apply to the O&M Work, including those provisions related to Pre-existing Hazardous Materials and Releases of Hazardous Materials.

5.2.5 Environmental Compliance

Throughout the course of the O&M Work, Developer shall comply with all Environmental Laws and perform or cause to be performed all environmental mitigation measures required under the Contract Documents or under the Environmental Approvals, including the consents

and approvals obtained thereunder, and shall comply with all other conditions and requirements thereof. Developer, at its sole cost and expense, shall also abide by and comply with the commitments contained in the environmental impact documentation related to the NEPA/CEQA Approval and any additional commitments contained in subsequent re-evaluations and Environmental Approvals required for the Renewal Work.

5.2.6 Utility Accommodation

5.2.6.1 It is anticipated that from time to time during the O&M Work, Utility Owners will apply for additional utility permits to install new Utilities that would cross or longitudinally occupy areas of the Project that are subject to the Department's permitting jurisdiction, or to modify, repair, upgrade, relocate or expand existing Utilities within such areas. In such circumstances, the provisions of Section 4.5.6 shall apply.

5.2.6.2 Throughout the performance of the O&M Work, Developer shall monitor Utilities and Utility Owners within the Project Right of Way for compliance with applicable utility permits, the Department regulations, policies and other requirements, and other applicable Law and Governmental Approvals, and shall use diligent efforts to obtain the cooperation of each Utility Owner having Utilities within the Project Right of Way in accordance with the Contract Documents.

5.2.7 Emergency Repair Work

5.2.7.1 Developer shall be responsible for procuring and overseeing temporary and/or permanent emergency repair work for the Project. Unless specified otherwise by the Department, Developer shall solicit competitive bids for such work in accordance with policies and procedures established by the Department. The Department shall provide oversight relating to emergency repair work in accordance with the Contract Documents.

5.2.7.2 Developer shall ensure that such repair work is performed in accordance with the Contract Documents and State and federal Law applicable to such repair work, including the requirements of the FHWA Emergency Relief Manual. Further, Developer shall maintain estimates, cost records and supporting documentation in accordance with such Laws, and in a form and content to enable the Department to seek reimbursement for eligible costs from FHWA or FEMA, if applicable.

5.3 Annual Budget

5.3.1 For each full or partial Fiscal Year beginning with commencement of the Operating Period, Developer shall file with the Department an annual budget for performing the O&M Work for such full or partial Fiscal Year. Developer shall submit the first annual budget to the Department not later than [60] days before the anticipated start of the Operating Period. Developer shall submit each subsequent annual budget to the Department not later than [60] days before the beginning of the Fiscal Year to which the annual budget applies.

5.3.2 If Developer delivers an annual budget to the Collateral Agent for the senior Project Debt, it shall serve as the annual budget to be delivered to the Department. Otherwise, each such annual budget shall be in a form acceptable to the Department, acting reasonably. Each annual budget shall contain budgeted Availability Payments and expenses (showing separately forecasted costs for the Fiscal Year of Renewal Work consistent with the updated

Renewal Work Schedule and Handback Requirements). Developer may incorporate the updated Renewal Work Schedule as part of the annual budget.

5.4 Oversight, Meetings and Reporting

5.4.1 Oversight by the Department

The Department shall have the right but not the obligation to perform oversight and auditing relating to the O&M Work in accordance with the Contract Documents.

5.4.2 Meetings

5.4.2.1 Developer shall schedule all progress and periodic meetings with its Lead Operations and Maintenance Firm at a date, time and place reasonably convenient for the Department to attend and, except in the case of urgency, shall provide the Department with written notice and an agenda for such meetings at least [five] Business Days in advance of each meeting. The Department is authorized to attend all such meetings and is permitted to raise any questions, concerns or opinions without restriction.

5.4.2.2 In addition to the regularly scheduled meetings set forth in [Section ___ of Division ___], the Department and Developer, through their respective Authorized Representatives, shall meet from time to time at the other Party's request to discuss and resolve matters relating to the O&M Work or Project.

5.4.3 Reporting

Developer shall submit all reports relating to the O&M Work, including the O&M Annual Reports, in the form, with the content and within the time required under the Contract Documents.

5.5 Renewal Work

5.5.1 Developer shall diligently perform Renewal Work as and when necessary to maintain compliance with the performance measures, standards and requirements set forth in the Technical Requirements. Developer also shall perform Renewal Work according to the other applicable terms of the Technical Requirements, including, when applicable, the Handback Requirements. Developer shall use the Renewal Work Schedule, as updated from time to time, for scheduling and performing Renewal Work.

5.5.2 No later than [90] days after the end of each Calendar Year during the Operating Period, Developer shall deliver to the Department a written report of the Renewal Work performed as required under [Section ___ of Division ___]. The report also shall set forth the total draws and deposits made from and to the Renewal Work Reserve in the immediately preceding Calendar Year and the date, amount and use of each draw (including any use for Compliance Work or Handback Requirements work).

5.5.3 If at any time the Department determines that Developer has failed to complete any part of the Renewal Work within the time required under the Contract Documents or Renewal Work Schedule, the Department shall give written notice thereof to Developer. If Developer has failed to complete the Renewal Work within [30] days after the Department delivers such notice, then the Department shall have the right, but not the obligation, to perform

and complete such Renewal Work at the expense and for the account of Developer, and to make draws from the Renewal Work Reserve to pay the costs of such action, subject to the Lenders' rights to cure such failure and the Lenders' rights in and to the Renewal Work Reserve established in the Financing Documents. If the amounts in the Renewal Work Reserve are insufficient or the Department is unable to make draws from the Renewal Work Reserve, the Department shall have the right to use and apply payments otherwise payable to Developer by the Department under this Agreement to pay the costs of such action. The foregoing remedy is in addition to any other remedies available to the Department under the Contract Documents on account of such failure, including the assessment of Noncompliance Points, and its right to intervene immediately and without notice to address Developer failures regarding Safety Standards, Safety Compliance, uses or Closures.

5.5.4 Developer may, by notice to the Department, object to any demand by the Department under Section 5.5.3 on the grounds that Developer has completed the Renewal Work specified in the Department's demand or that such Renewal Work is not then required, which notice shall give details of the grounds for objection. Promptly after the delivery of any such notice, the Parties will endeavor to reach agreement as to any matters referred to in the notice. If no agreement is reached as to any such matter within [30] days after Developer delivers such notice, either Party may refer the matter for resolution according to the Dispute Resolution Procedures.

5.6 Renewal Work Schedule

5.6.1 [60] days prior to the beginning of each Calendar Year, Developer shall submit a Renewal Work Schedule and updates as required under [Section __ of Division __]. Developer's preparation of the updated Renewal Work Schedule shall include revisions as reasonably indicated by experience and then-existing conditions respecting the Project, changes in estimated costs of Renewal Work, Renewal Work Reserve funding and drawing plan and schedule, changes in technology, changes in Developer's planned means and methods of performing Renewal Work, and other relevant factors. The updated Renewal Work Schedule shall show the revisions, if any, to the prior Renewal Work Schedule and include an explanation of reasons for revisions. If no revisions are proposed, Developer shall include an explanation of the reasons no revisions are necessary. The updated Renewal Work Schedule also shall set forth, by Element, Developer's planned draws from the Renewal Work Reserve during the forthcoming five Calendar Years.

5.6.2 At the Department's request, Developer and its Lead Operations and Maintenance Firm, if any, shall promptly meet and confer with the Department to review and discuss the original or updated Renewal Work Schedule.

5.6.3 Within [30] days after receipt of the original and each updated Renewal Work Schedule, the Department shall have the right to object to or disapprove the original or updated Renewal Work Schedule or any elements thereof. Comments, objections and disapprovals by the Department shall be based on whether the original or updated Renewal Work Schedule and underlying assumptions are reasonable, realistic and consistent with the Contract Documents.

5.6.4 Within [30] days after receiving written notice of comments, objections, recommendations and disapprovals from the Department, Developer shall submit to the Department a revised original or updated Renewal Work Schedule rectifying such matters and, for matters it disagrees with, a written notice setting forth those comments, objections, recommendations and disapprovals that Developer disputes, which notice shall give details of

Developer's grounds for dispute. If Developer fails to give such notice within such time period, it shall be deemed to have accepted the comments, objections and recommendations and the original or updated Renewal Work Schedule, as applicable, shall thereupon be deemed revised to incorporate the comments and recommendations and to rectify the objections. After timely delivery of any such notice, Developer and the Department shall endeavor in good faith to reach agreement as to the matters listed in the notice. If no agreement is reached as to any such matter within [30] days after Developer delivers its notice, either Party may refer the Dispute for resolution according to the Disputes Resolution Procedures.

5.6.5 The portions of the original or updated Renewal Work Schedule submitted by Developer that are not in Dispute shall go into effect and govern, while the immediately preceding Renewal Work Schedule (if any) shall remain in effect and govern until resolution as to those portions of the submitted Renewal Work Schedule that are in Dispute.

5.7 Renewal Work Reserve

5.7.1 Establishment

5.7.1.1 Developer shall establish and fund a reserve account (the "**Renewal Work Reserve**") that may be used for the purposes set forth in Section 5.7.3. The Renewal Work Reserve shall at a minimum be in the amount identified in Appendix 2-F and shall be established under arrangements that, subject to the prior rights of the Lenders in and to the Renewal Work Reserve established in the Financing Documents in compliance with Section 15.4.10, will ensure its availability to the Department if the Department exercises its option to perform the Renewal Work in accordance with Section 5.5.3.

5.7.1.2 Developer shall provide to the Department the details regarding the account, including the name, address and contact information for the depository institution and the account number. Developer shall inform the depository institution of all of the Department's rights and interests with respect to the Renewal Work Reserve, which shall be subordinate to the rights of the Lenders in and to the account as provided in the Financing Documents in compliance with Section 15.4.10, including the Department's right to draw on the Renewal Work Reserve as provided in Section 5.5.3. Developer shall deliver such notices to the depository institution and execute such documents as may be required to establish and perfect the Department's interest in the Renewal Work Reserve under the Uniform Commercial Code as adopted in the State, which interest shall be subordinate to the rights of the Lenders under the Financing Documents as provided herein.

5.7.1.3 In lieu of establishing the Renewal Work Reserve, Developer may deliver to the Department Renewal Work Letters of Credit, on the terms and conditions set forth in Section 5.7.6.

5.7.2 Funding

Developer shall make deposits to the Renewal Work Reserve at the frequencies or intervals and in the amounts as determined by the Lenders under the Funding Agreements, as such requirements may be waived or amended by the Lenders. Notwithstanding the foregoing, Developer shall obtain the Department's reasonable consent, in writing, if the amount deposited to the Renewal Work Reserve is less than the amount set forth therefor in Developer's Proposal.

5.7.3 Use

5.7.3.1 In addition to any other uses of the Renewal Work Reserve permitted by the Lenders under the Funding Agreements (provided that amounts in the Renewal Work Reserve are not available as security for repayment of Project Debt or making Distributions), Developer will have the right to draw from the Renewal Work Reserve for the following purposes:

1. Costs of Renewal Work;
2. Costs of Compliance Work; and
3. Costs of work pursuant to the Handback Requirements.

The use of amounts in the Renewal Work Reserve for any purpose other than as permitted in this Section 5.7.3.1 shall be a Developer Default.

5.7.3.2 If Developer intends to spend from the Renewal Work Reserve less than [90]% of the amount set forth in the applicable Renewal Work Schedule for the scheduled Renewal Work, Developer shall obtain the reasonable consent of the Department in writing. Any amounts deposited to the Renewal Work Reserve for the scheduled Renewal Work, as updated in accordance with this Section 5.7, in excess of the amount spent by Developer in performing such Renewal Work may be distributed to Developer only with the reasonable consent of the Department in writing.

5.7.4 Disposition Upon Establishment of Handback Requirements Reserve Account or Earlier Termination

5.7.4.1 The Renewal Work Reserve shall be used to establish and fund the Handback Requirements Reserve Account as and within the time required under Section 5.10.1. Upon establishment and funding of the Handback Requirements Reserve Account, Developer's obligations to fund the Renewal Work Reserve pursuant to this Section 5.7 shall terminate.

5.7.4.2 If this Agreement is terminated for any reason prior to the establishment of the Handback Requirements Reserve Account, including termination due to Developer Default, the Department's interest in the Renewal Work Reserve shall terminate.

5.7.5 Coordination with Lender Requirements

5.7.5.1 It is the Parties' intent that any major maintenance or Renewal Work reserve required by the Lenders serve as the Renewal Work Reserve required under this Section 5.7.

5.7.5.2 Except as otherwise provided in this Agreement, no provisions of Financing Documents shall have any effect on the applicability and enforcement of any other provisions of the Contract Documents pertaining to Renewal Work, the Renewal Work Schedule or the Renewal Work Reserve.

5.7.6 Renewal Work Letters of Credit

5.7.6.1 In lieu of establishing the Renewal Work Reserve, Developer may deliver one or more letters of credit (each, a “**Renewal Work Letter of Credit**”), on the terms and conditions set forth in this Section 5.7.6 and Section 16.3. If the Renewal Work Reserve has been previously established, Developer at any time thereafter may substitute one or more Renewal Work Letters of Credit for all or any portion of the amounts required to be on deposit in the Renewal Work Reserve, on the terms and conditions set forth in this Section 5.7.6 and Section 16.3. Upon receipt of the required substitute Renewal Work Letter of Credit, amounts in the Renewal Work Reserve shall be released to Developer equal to the face amount of the substitute Renewal Work Letter of Credit. The amount of the Renewal Work Letter of Credit shall be subject to adjustment in accordance with Section 5.7.2.

5.7.6.2 The Department shall be named as the beneficiary under the Renewal Work Letter of Credit and shall have the right to draw on the Renewal Work Letter of Credit (a) if Developer fails to pay or perform as and when due any obligation with respect to Renewal Work under the Contract Documents for which the Renewal Work Letter of Credit is held, or (b) in any circumstance described in Section 16.3.3(b) or (c), in which event the Department shall deposit the proceeds from such drawing into the Renewal Work Reserve.

5.7.6.3 In the event the Department draws on a Renewal Work Letter of Credit, the Department shall have the right to use and apply the proceeds of such drawing as provided in Section 5.5.3.

5.7.6.4 The Department’s interest in the Renewal Work Letter of Credit shall terminate at the same time as its interest in the Renewal Work Reserve terminates under Section 5.7.4.

5.8 Policing, Security and Incident Response

5.8.1 Police Services

5.8.1.1 Developer acknowledges that any Governmental Entity empowered to enforce all applicable Laws is free to enter the Project at any and all times to carry out its law enforcement duties. No provision of this Agreement is intended to surrender, waive or limit any police powers of any Governmental Entity, and all such police powers are hereby expressly reserved.

5.8.1.2 The Department and Developer shall not have any liability or obligation to each other resulting from, arising out of or relating to the failure of a public law enforcement agency to provide services, or its negligence or misconduct in providing services.

5.8.2 Security and Incident Response

5.8.2.1 Except as expressly set forth herein, Developer is responsible for the safety and security of the Project and the workers and public thereon during the performance of the Work.

5.8.2.2 Developer shall comply with all rules, directives and guidance of the U.S. Department of Homeland Security and comparable State agency and shall coordinate and cooperate with the Department and all other Governmental Entities providing security, first

responder and other public emergency response services in accordance with the Contract Documents.

5.8.2.3 Developer shall perform and comply with the provisions of the Technical Requirements concerning Emergencies, Incident Response, safety and security, including implementing all procedures, plans, protocols and requirements set forth in [Section ___ of Division ___] and in the Emergency Response Plan in the event of Emergencies.

5.9 Handback Requirements

5.9.1 Handback Condition

5.9.1.1 Upon the Termination Date, Developer shall transfer the Project, including any Upgrades, to the Department, at no charge to the Department, in the condition and meeting all of the requirements set forth in [Section ___ of Division ___] ("**Handback Requirements**").

5.9.1.2 In the event of the earlier termination of this Agreement, Developer shall only be required to comply with the requirements of this Section 5.9 to the extent that any Renewal Work was scheduled to have been performed prior to the Early Termination Date.

5.9.2 Handback Inspections

The Department will have the right to conduct inspections of the Project at the times and according to the terms and procedures specified in the Handback Requirements, approved Handback Evaluation Plan and approved Handback Renewal Work Plan.

5.9.3 Handback Renewal Work

Developer shall prepare the Handback Renewal Work Plan as required under [Section ___ of Division ___], and shall include therein a schedule and description for the Handback Renewal Work based the required adjustments and changes to the Renewal Work Schedule resulting from the inspections and analysis under the Handback Requirements and Handback Evaluation Plan. The Handback Renewal Work Plan shall be subject to Department review and comment. Developer shall diligently perform and complete all Handback Renewal Work:

5.9.3.1 Prior to the Termination Date, if transfer of the Project is to occur at the natural expiration of the Term; or

5.9.3.2 As close as possible to the Early Termination Date, but only for Renewal Work scheduled to be performed as of the Early Termination Date. If Developer fails to complete such work prior to the Early Termination Date, the Department shall deduct the cost of completing such work from the amount of compensation, if any, payable to Developer as a result of the early termination of this Agreement.

5.10 Handback Requirements Reserve Account

5.10.1 Establishment

5.10.1.1 Beginning [four] full Calendar Years before the expected end of the Term, Developer shall establish a reserve account (the "**Handback Requirements Reserve**")

Account") exclusively available for the uses set forth in Section 5.10.3. Developer shall provide to the Department the details regarding the account, including the name, address and contact information for the depository institution and the account number. The Department shall have a first priority perfected security interest in the Handback Requirements Reserve Account, and the right to receive directly from the depository institution monthly account statements.

5.10.1.2 In lieu of Developer establishing the Handback Requirements Reserve Account, Developer may deliver to the Department Handback Requirements Letters of Credit on the terms and conditions set forth in Section 5.10.4 and Section 16.3.

5.10.2 Funding

5.10.2.1 The Financial Model projects the amount of funds to be held in the Handback Requirements Reserve Account to fund the Handback Renewal Work. The Parties shall re-estimate the costs of the Handback Renewal Work, and the Handback Renewal Amount, in accordance with [Section __ of Division __]. Pursuant to Section 5.7.4.1, Developer shall transfer amounts in the Renewal Work Reserve into the Handback Requirements Reserve Account on the date set forth in Section 5.10.1.1. Beginning on the [36th] month prior to the expected end of the Term, if amounts then on deposit in the Handback Requirements Reserve Account are insufficient to pay the costs of the Handback Renewal Work as estimated by the Parties in accordance with [Section __ of Division __], Developer shall deposit each month into the Handback Requirements Reserve Account an amount to fund the shortfall (the "**Monthly Handback Reserve Deposit**"). The Monthly Handback Reserve Deposit will be calculated in accordance with Section 5.10.2.2. If Developer does not have sufficient funds to pay the full amount of the Monthly Handback Reserve Deposit, then Developer will deposit an additional amount from the subsequent Quarterly Payment(s) to fund the shortfall for the prior month(s).

5.10.2.2 The Monthly Handback Reserve Deposit shall equal the Handback Renewal Amount as estimated following each inspection of the Project, less any amounts then on deposit in the Handback Requirements Reserve Account, divided by the number of months remaining [until the date that is [six] months before the end of] the Term.

5.10.2.3 The Monthly Handback Reserve Deposit will be subject to adjustment following each annual inspection of the Project taking into account the Handback Renewal Amount determined annually as provided in [Section __ of Division __] and the amount of funds then on deposit in the Handback Requirements Reserve Account. If the Handback Renewal Amount has not been determined at the beginning of each Calendar Year as provided in [Section __ of Division __], the Monthly Handback Reserve Deposit shall equal the Monthly Handback Reserve Deposit for the prior year.

5.10.2.4 Funds held in the Handback Requirements Reserve Account may be invested and reinvested only in Eligible Investments. Eligible Investments in the Handback Requirements Reserve Account must mature during the Term, or the principal of and accrued interest on such Eligible Investments must be available for withdrawal at any time during the Term without penalty. All interest earned or profits realized from Eligible Investments in the Handback Requirements Reserve Account shall be retained therein.

5.10.2.5 If Developer fails to make the deposit of any Monthly Handback Reserve Deposit when due, including funding any prior month's shortfall as required in Section

5.10.2.1, the Department shall be entitled to deduct the amount of the Monthly Handback Reserve Deposit from the Quarterly Payment due to Developer at the time of payment of the Quarterly Payment to Developer, and shall deposit such amount to the Handback Requirements Reserve Account on behalf of Developer.

5.10.3 Use

5.10.3.1 Developer shall be entitled to draw funds from the Handback Requirements Reserve Account in such amounts and at such times as needed only to make progress and final payments for Handback Renewal Work performed as required by the Handback Renewal Work Plan prepared in accordance with [Section ___ of Division ___]. Amounts in the Handback Requirements Reserve Account can only be used for the purposes described in this Section 5.10.3.1 and are not available as security for repayment of Project Debt or making Distributions. The use of amounts in the Handback Requirements Reserve Account for any purpose other than as permitted in this Section 5.10.3.1 shall be a Developer Default. Prior to drawing funds from the Handback Requirements Reserve Account, Developer shall give written notice to the Department of the amount to be drawn and reasonable evidence, including copies of Contractor invoices, of the Handback Renewal Work performed relating to the draw and the cost thereof. The Department shall have [ten] days from the date of the receipt of such notice to disapprove the draw from the Handback Requirements Reserve Account. The Department may disapprove the draw only if the requested amount and/or purposes for which the funds will be used does not comply with the Handback Renewal Work Plan. If the Department fails to disapprove the draw within the [10] day period following receipt of notice, Developer shall be entitled to draw funds from the Handback Requirements Reserve Account in the manner described in the notice to the Department.

5.10.3.2 If, after recalculation of the Handback Renewal Amount following any of the annual inspections provided for in the Handback Requirements, the amount on deposit in the Handback Requirements Reserve Account exceeds the Handback Renewal Amount, Developer shall be entitled to draw any surplus amount and no further Monthly Handback Reserve Deposits shall be made until the next inspection and determination of the Handback Renewal Amount.

5.10.3.3 On the Termination Date, any amounts held in the Handback Requirements Reserve Account shall be paid to Developer, less any costs (including professional fees, staff costs, overheads and administrative expenses), if any, the Department reasonably expects to incur to perform the Work necessary to meet the Handback Requirements as of the Termination Date.

5.10.4 Handback Requirements Letters of Credit

5.10.4.1 In lieu of establishing the Handback Requirements Reserve Account, Developer may deliver to the Department one or more letters of credit (each, a “**Handback Requirements Letter of Credit**”), on the terms and conditions set forth in this Section 5.10.4 and Section 16.3. If the Handback Requirements Reserve Account has been previously established, Developer at any time thereafter may substitute one or more Handback Requirements Letters of Credit for all or any portion of the amounts required to be on deposit in the Handback Requirements Reserve Account, on the terms and conditions set forth in this Section 5.10.4. Upon receipt of the required substitute Handback Requirements Letter of Credit, the Department shall authorize the release to Developer of amounts in the Handback Requirements Reserve Account equal to the face amount of the substitute Handback

Requirements Letter of Credit. If the face amount of all Handback Requirements Letters of Credit is less than the total amount required to be funded to the Handback Requirements Reserve Account prior to expiration of the Handback Requirements Letter of Credit, Developer shall be obligated to pay, when due, the shortfall into the Handback Requirements Reserve Account. Alternatively, Developer may deliver a Handback Requirements Letter of Credit with a face amount equal to at least the total amount required to be funded to the Handback Requirements Reserve Account during the period up to the expiration of the Handback Requirements Letter of Credit, or may deliver additional Handback Requirements Letters of Credit or cause the existing Handback Requirements Letter of Credit to be amended to cover the shortfall before deposits of the shortfall to the Handback Requirements Reserve Account are due. The Department shall be named as the sole beneficiary under the Handback Requirements Letter of Credit.

5.10.4.2 The Department shall have the right to draw on the Handback Requirements Letter of Credit upon the Termination Date in an amount equal to any costs (including professional fees, staff costs, overheads and administrative expenses) the Department reasonably expects to incur as a consequence of Developer's failure to comply with the Handback Requirements. Further, the Department shall have the right to draw on the Handback Requirements Letter of Credit in any circumstance described in Section 16.3.3(b) or (c), in which event the Department shall deposit the proceeds from such drawing into the Handback Requirements Reserve Account.

ARTICLE 6. NONCOMPLIANCE POINTS

6.1 Noncompliance Points System

6.1.1 Appendix 6 to this Agreement sets forth a table for the identification of Noncompliance and the cure period (if any) available to Developer for each such Noncompliance. Noncompliance Points are a system to measure Developer performance levels during the design, construction and operations and maintenance phases of the Project and trigger the remedies set forth in this Article 6.

6.1.2 The table set forth in Appendix 6 contains a representational, but not exhaustive, list of Noncompliance possible under the Contract Documents. Accordingly, subject to Section 6.1.3, the Department may from time to time add an entry to such table describing a Noncompliance under the existing Contract Documents that was not previously included in the table, establishing the Noncompliance Points applicable to such Noncompliance and setting a cure period therefor (or no cure period). The Department shall notify Developer in writing whenever the Department separately proposes to make such additions to Appendix 6. Developer shall have [15] days after receipt of any recommended additions or adjustments to deliver written comments. Thereafter, the Department shall render its decision regarding whether and on what terms to incorporate the proposed additions to Appendix 6 by written notice to Developer. The Department's right to make additions or adjustments to Appendix 6 is not intended to expand Developer's existing contractual obligations as set forth in the Contract Documents, but rather to add existing contractual obligations as set forth in the Contract Documents to the list of Noncompliance for which Noncompliance Points may be assessed.

6.1.3 The Department's right to add existing contractual obligations to Appendix 6 is limited to those contractual obligations which Developer has previously failed to comply with; provided that the Department has furnished Developer with prior written notice of such failure

and Developer has subsequently violated such contractual obligations after receipt of such notice. Further, the Department shall have no right to assess Noncompliance Points on account of a Noncompliance that occurs prior to the date it is added to Appendix 6.

6.2 Assessment, Notification and Cure Process

6.2.1 Notification Initiated by Developer

As an integral part of Developer's self-monitoring obligations, Developer shall notify the Department in writing of the occurrence of any Noncompliance specified in Appendix 6, as it may be revised from time to time. Developer shall deliver such notice in writing as soon as reasonably practicable, and in any event within [seven] days, after Developer first obtains knowledge of or first should have reasonably known of the Noncompliance. The notice shall describe the Noncompliance in reasonable detail and shall identify the applicable cure period. Within a reasonable time after receiving the notice and lapse of any cure period, the Department shall deliver to Developer a written notice setting forth the Department's determination whether the Noncompliance was cured during the cure period and, if not, whether to assess Noncompliance Points (a "notice of determination").

6.2.2 Notification Initiated by the Department

If the Department believes there has occurred any Noncompliance specified in Appendix 6, as it may be revised from time to time, the Department may deliver to Developer a notice of determination setting forth the Noncompliance, the applicable cure period and the Noncompliance Points to be assessed with respect thereto.

6.2.3 Cure Periods

6.2.3.1 Developer shall have the cure period (if any) for each Noncompliance set forth in Appendix 6.

6.2.3.2 Developer's cure period (if any) with respect to such Noncompliance shall be deemed to start upon the date Developer first obtained knowledge of, or first reasonably suspected, the Noncompliance. For this purpose, if the notice of the Noncompliance is initiated by the Department, Developer shall be deemed to first obtain knowledge of the Noncompliance not later than the date of delivery of the notice to Developer.

6.2.3.3 Each of the cure periods set forth in Appendix 6, as revised from time to time, shall be the only cure period for Developer applicable to the Noncompliance and supersedes any cure period otherwise applicable under Section 18.1.2.

6.2.4 Notification of Cure

When Developer determines that it has completed cure of any Noncompliance for which it is being assessed Noncompliance Points, Developer shall deliver written notice to the Department identifying the Noncompliance, stating that Developer has completed cure and briefly describing the cure, including any modifications to the Project Management Plan and Quality Plan to protect against future similar Noncompliance. Thereafter, the Department shall promptly inspect to verify completion of the cure and shall, if it verifies completion of the cure, deliver to Developer a written certification of cure. The Department may, via written notice of rejection, reject any Developer notice of cure if it determines that Developer has not cured the

Noncompliance and shall, upon making this determination, deliver a written notice of rejection to Developer. Any Dispute regarding certification or non-certification of cure shall be resolved according to the Dispute Resolution Procedures.

6.3 Assessment of Noncompliance Points

6.3.1 If at any time (a) any report indicates or the Department is notified or otherwise becomes aware of a Noncompliance or (b) the Department serves notice of determination under Section 6.2.2, then, without prejudice to any other right or remedy available to the Department, the Department may assess Noncompliance Points in accordance with Appendix 6, as revised from time to time, subject to the following terms and conditions:

6.3.1.1 The date of assessment shall be deemed to be the date of the initial notification under Section 6.2.

6.3.1.2 The number of points listed in Appendix 6 for any particular Noncompliance is the maximum number of Noncompliance Points that may be assessed for each event or circumstance that is a Noncompliance. The Department may, but is not obligated to, assess less than the maximum.

6.3.1.3 Upon occurrence of the Noncompliance entitling the Department to assess Noncompliance Points, and to the extent the Department has determined to assess Noncompliance Points, the Department shall only allocate the percent thereof set forth in the following table prior to expiration of the applicable cure period. If the Noncompliance is not fully and completely cured by the expiration of the applicable cure period, the remaining percentage of Noncompliance Points indicated in the following table shall be deemed assessed, without further notice.

Notification Category:	Percent Assessed Prior to Expiration of Applicable Cure Period (if any):	Remaining Percent Assessed (a) if No Cure Period or (b) After Expiration of Applicable Cure Period without Full and Complete Cure (totaling 100%):
Notification initiated by Developer under <u>Section 6.2.1</u>	0%	100%
Notification initiated by the Department under <u>Section 6.2.2</u>	100%*	0%

* This 100% allocation of Noncompliance Points may be reduced in accordance with Section 6.3.1.5.

6.3.1.4 For the purpose of applying the foregoing table, if the Department, on the one hand, and Developer, on the other hand, deliver concurrent written notices under Section 6.2 of the same Noncompliance, Developer's notice shall prevail. Notices shall be deemed to be concurrent if each sends its written notice before actually receiving the written

notice from the other. Knowledge of the other's written notice obtained prior to actual receipt of the notice shall have no effect on determining whether concurrent notice has occurred.

6.3.1.5 Appendix 6 assigns certain instances of Noncompliance a fast cure period, which is a shorter cure period within the full cure period allowed for the associated Noncompliance ("**Fast Cure Period**"). If the Department has delivered to Developer a notice of determination under Section 6.2.2 for one of the instances of Noncompliance that has a Fast Cure Period assigned to it in Appendix 6, and if Developer cures the relevant Noncompliance within the Fast Cure Period, the Department will assess Noncompliance Points at the rate of 50% of the Noncompliance Points that would otherwise be assessed in relation to that Noncompliance. Fast Cure Periods and their related reduced amounts of Noncompliance Points do not apply to circumstances where Developer delivers a written notice of a Noncompliance under Section 6.2.1.

6.3.2 If a Noncompliance is capable of being remedied but is not fully and completely cured within the applicable cure period or Interval of Recurrence (if any), then continuation of such Noncompliance beyond such cure period or Interval of Recurrence, as applicable, shall be treated as a new and separate Noncompliance, without necessity for further notice, for the purpose of assessing Noncompliance Points. Accordingly, a new cure period or Interval of Recurrence, as applicable, equal to the prior cure period or Interval of Recurrence shall commence upon expiration of the prior cure period or Interval of Recurrence, without further notice; and the Noncompliance Points and the assessment percentages set forth in Section 6.3.1.3 shall again apply. Regardless of the continuing assessment of Noncompliance Points under this Section 6.3.2, the Department shall be entitled to exercise its step-in rights under Section 18.2.4 and, if applicable, its work suspension rights under Section 18.2.7, after expiration of the initial cure period or Interval of Recurrence available to Developer. However, if and when the Department commences to exercise its step-in rights (after any prior opportunity of Lenders to exercise their step-in rights has expired without exercise), Noncompliance Points shall no longer accrue with regard to the subject Noncompliance. If the Noncompliance is one for which no cure period is provided, then continuation thereof shall not be treated as a new or separate Noncompliance.

6.3.3 Developer is responsible for keeping and providing the Department with current records of the number of assessed Noncompliance Points for Noncompliance, the date of each assessment, and the date when the Noncompliance were cured.

6.4 Monetary Deductions Assessed for Certain Noncompliance

6.4.1 General

In addition to Noncompliance Points, certain instances of Noncompliance shall result in monetary deductions as set forth in the Contract Documents.

6.4.2 Basis for Deductions

6.4.2.1 Developer acknowledges that the monetary deductions assessed in accordance with the Contract Documents are reasonable liquidated damages in order to compensate the Department for:

1. The Department's increased costs of administering this Agreement, including the increased costs of engineering, legal, accounting, monitoring, oversight

and overhead, and could also include obligations to pay or reimburse Governmental Entities with regulatory jurisdiction over the Project for violation of applicable Governmental Approvals or for their increased costs of monitoring and enforcing Developer's compliance with applicable Governmental Approvals;

2. Potential harm and future costs to the Department from reduction in the condition and useful life of the Project;
3. Potential harm to the credibility and reputation of the Department's transportation improvement program with other Governmental Entities, with policy makers and with the general public;
4. Potential harm and detriment to Users, which may include additional wear and tear on vehicles and increased costs of congestion, travel time and accidents; and
5. The Department's increased costs of addressing potential harm to the Environment, including increased harm to air quality caused by congestion, and harm to water quality, soils conditions, historic structures and other environmental resources caused by Noncompliance.

6.4.2.2 Developer further acknowledges that these damages would be difficult and impracticable to measure and prove, because, among other things, (a) the Project is of a unique nature and no substitute for it is available; (b) the costs of monitoring and oversight prior to increases in the level thereof will be variable and extremely difficult to quantify; (c) the nature and level of increased monitoring and oversight will be variable depending on the circumstances; and (d) the variety of factors that influence use of and demand for the Project make it difficult to sort out causation of the matters that will trigger these liquidated damages and to quantify actual damages.

6.5 Provisions Regarding Dispute Resolution

6.5.1 Developer may object to the assessment of Noncompliance Points or the starting point for the cure period respecting any Noncompliance listed in Appendix 6 by delivering to the Department written notice of such objection not later than [20] days after the Department delivers its written notice of such Noncompliance.

6.5.2 Developer may object to any Department decision under Section 6.1.2 regarding whether and on what terms to add instances of Noncompliance to Appendix 6, including the number of Noncompliance Points to be assigned to such Noncompliance, by delivering to the Department written notice of such objection not later than [20] days after the Department delivers its written decision.

6.5.3 Developer may object to the Department's rejection of any Developer notice of cure given pursuant to Section 6.2.4 by delivering to the Department written notice of such objection not later than [20] days after the Department delivers its written notice of rejection.

6.5.4 If for any reason Developer fails to deliver its written notice of objection within the applicable time period, Developer shall be conclusively deemed to have accepted the matters set forth in the applicable Department notice, and to have irrevocably waived its rights and be

forever barred from challenging them.

6.5.5 If Developer gives timely notice of objection and the Parties are unable to reach agreement on any matter in Dispute within [ten] days of such objection, either Party may refer the matter for resolution according to the Dispute Resolution Procedures.

6.5.6 In the case of any Dispute as to the number of Noncompliance Points to assign for Noncompliance added to Appendix 6, the sole issue for decision shall be how many Noncompliance Points should be assigned in comparison with the number of Noncompliance Points set forth in Appendix 6 for Noncompliance of equivalent severity.

6.5.7 Pending the resolution of any Dispute arising under this Section 6.5, the provisions of this Article 6 shall take effect as if the matter were not in Dispute; provided that if the final decision regarding the Dispute is that (a) the Noncompliance Points should not have been assessed, (b) the number of Noncompliance Points must be adjusted, or (c) the starting point or duration of the cure period must be adjusted, then the number of Noncompliance Points assigned or assessed and the related liabilities of Developer shall be adjusted to reflect such decision.

6.5.8 Pending the resolution of any Dispute arising under this Section 6.5, the number of Noncompliance Points in Dispute shall not be counted for the purpose of determining whether the Department may declare a Persistent Developer Noncompliance.

6.6 Increased Oversight, Testing and Inspection

6.6.1 If at any time (a) Developer is assessed more than [50] Noncompliance Points in any consecutive [365]-day period; (b) more than [100] Noncompliance Points in any consecutive [1095]-day period; or (c) Developer accumulates more than [75] instances of Noncompliance included in Appendix 6, as it may be amended, in any consecutive [1095]-day period, then, in addition to other remedies available under the Contract Documents, the Department shall be entitled, at Developer's expense, to increase the level of monitoring, inspection, sampling, measuring, testing, auditing and oversight of the Project and Developer's compliance with its obligations under this Agreement, to such level as the Department sees fit, until such time as Developer has demonstrated to the reasonable satisfaction of the Department that Developer:

6.6.1.1 Has reduced the number of Noncompliance Points below the threshold triggering such heightened scrutiny;

6.6.1.2 Is diligently pursuing cure of all other instances of Noncompliance that have resulted in assessment of Noncompliance Points, has a written plan on how to cure the instances of Noncompliance, and has a deadline by which it will remedy each instance of Noncompliance;

6.6.1.3 Has cured any then-existing Developer Defaults; and

6.6.1.4 Will perform and is capable of performing its obligations under the Contract Documents.

6.6.2 The foregoing does not preclude the Department, at its sole discretion and expense, from increasing its level of monitoring, inspection, sampling, measuring, testing,

auditing and oversight at other times.

ARTICLE 7. CONTRACTING AND LABOR PRACTICES

7.1 Disclosure of Contracts and Contractors; Contracting Authority

7.1.1 Developer shall provide the Department with a list of all Contracts and the Contractors thereunder with each monthly report required under this Agreement or the Technical Requirements. Developer shall allow the Department ready access to all Contracts and records regarding Contracts and shall deliver to the Department, (a) within [ten] days after execution, copies of all Key Contracts, guarantees thereof and amendments and supplements to Key Contracts and guarantees thereof, and (b) within [ten] days after receipt of a request from the Department, copies of all other Contracts and amendments and supplements thereto as may be requested.

7.1.2 As soon as Developer identifies a potential first-tier Contractor, but in no event later than [15] days prior to the scheduled initiation of Work by such proposed Contractor, Developer shall notify the Department in writing of the name, address, phone number and authorized representative of such Contractor.

7.1.3 Developer is authorized to use any method of lawful contracting with Contractors, including the design-build method.

7.2 Responsibility for Work, Contractors and Employees

7.2.1 Developer shall retain or cause to be retained only Contractors that are qualified, experienced and capable in the performance of the portion of the Work assigned. Developer shall assure that each Contractor has at the time of execution of the Contract, and maintains at all times during performance of the assigned Work, all licenses required by applicable Laws. Developer shall not permit or suffer any Contractor to perform Work if that Contractor is ineligible to bid on, be awarded or perform work on public works projects pursuant to Section 1777.1 or 1777.7 of the California Labor Code. Pursuant to the provisions in Section 1777.1 of the California Labor Code, the Labor Commissioner publishes and distributes a list of contractors ineligible to perform work as a contractor on a public works project. This list of debarred contractors is available from the Department of Industrial Relations web site at http://www.dir.ca.gov/dir/Labor_law/DLSE/Debar.html.

7.2.2 The retention of Contractors by Developer will not relieve Developer of its responsibilities hereunder or for the quality of the Work or materials or services provided by it. Developer will at all times be held fully responsible to the Department for the negligence, willful misconduct, or breach of applicable Law or contract by Contractors.

7.2.3 Each Contract shall include terms and conditions sufficient to ensure both the acknowledgement and compliance by the Contractor with the Contract Documents and its requirements, and shall include those terms that are specifically required by the Contract Documents to be included therein.

7.2.4 Developer shall require each Contractor to familiarize itself with the requirements of any and all applicable Laws, including those Laws applicable to the use of federal-aid funds, and the conditions of any required Governmental Approvals.

7.2.5 Nothing in this Agreement will create any contractual relationship between the Department and any Contractor. No Contract entered into by or under Developer shall impose any obligation or liability upon the Department to any Contractor or any of its employees.

7.2.6 Developer shall supervise and be fully responsible for the negligence, willful misconduct, or breach of applicable Law or contract by any member or employee of Developer or any Developer-Related Entity, as though all such individuals were directly employed by Developer.

7.3 Key Contracts; Contractor Qualifications

7.3.1 Key Contract Approvals; Use of and Change in Key Contractors

7.3.1.1 The Key Contract with each of the Lead Contractor, Lead Engineering Firm and Lead Operations and Maintenance Firm (if applicable) shall be subject to the Department's prior written approval.

7.3.1.2 Developer shall retain, employ and utilize the firms and organizations specifically listed in Appendix 2-H to fill the corresponding Key Contractor positions listed therein. Developer shall not terminate any Key Contract with a Key Contractor, or permit or suffer any substitution or replacement (by way of assignment of the Key Contract, transfer to another of any material portion of the scope of work, or otherwise) of such Key Contractor, except in the case of material default by the Key Contractor or with the Department's prior written approval in its good faith discretion. For Key Contractors not identified in Appendix 2-H, Developer's selection thereof shall be subject to the Department's prior written approval in its good faith discretion.

7.3.2 Key Contract Provisions

Each Key Contract shall:

7.3.2.1 Require the Key Contractor to carry out its scope of work in accordance with the Contract Documents, the Governmental Approvals, applicable Law, and plans, systems and manuals developed and used by Developer pursuant to the Contract Documents;

7.3.2.2 Include a covenant to maintain all licenses required by applicable Law;

7.3.2.3 Set forth a standard of professional responsibility or a standard for commercial practice equal to the requirements of the Contract Documents and in accordance with Best Management Practice for work of similar scope and scale;

7.3.2.4 Set forth warranties, guaranties and liability provisions of the Key Contractor in accordance with Best Management Practice for work of similar scope and scale;

7.3.2.5 Expressly state that all remaining warranties and guarantees, express or implied, shall inure to the benefit of the Department and its successors and assigns upon expiration of the term or earlier termination of the Agreement;

7.3.2.6 Require the Key Contractor to procure the applicable Payment Security and Performance Security (as applicable) required under Section 16.2, if any, prior to commencement of any work by or on behalf of the Key Contractor;

7.3.2.7 In the case of each Key Contractor that has provided a Payment Security and/or Performance Security with the Department named as a dual obligee, expressly provide that the Key Contractor shall have no right to suspend or demobilize unless and until it delivers to the Department written notice of Developer's breach or default;

7.3.2.8 Require the personal services of and not be assignable by the Key Contractor without Developer's and the Department's prior written consent, provided that this provision shall not prohibit the subcontracting of portions of the Work;

7.3.2.9 Expressly include the requirements and provisions set forth in this Agreement applicable to Contractors regarding Intellectual Property rights and licenses;

7.3.2.10 Expressly require the Key Contractor to participate in meetings between Developer and the Department concerning matters pertaining to such Key Contractor, its work or the coordination of its work with other Contractors, provided that all direction to such Key Contractor shall be provided by Developer, and provided further that nothing in this Section 7.3.2.10 shall limit the authority of the Department to give such direction or take such action as in its opinion is necessary to remove an immediate and present threat to the safety of life or property;

7.3.2.11 Include an agreement by the Key Contractor to participate in any dispute resolution proceeding pursuant to Article 24, if such participation is requested by either the Department or Developer;

7.3.2.12 Without cost to Developer or the Department and subject to the Lender's rights under the Direct Agreement, expressly permit assignment to the Department of all Developer's rights under the Key Contract, contingent only upon delivery of written request from the Department pursuant to Section 19.6.3.1, allowing the Department to assume the benefit of Developer's rights with liability only for those remaining obligations of Developer accruing after the date of assumption, such assignment to include the benefit of all Key Contractor warranties, indemnities, guarantees and professional responsibility;

7.3.2.13 Expressly state that any acceptance of assignment of the Key Contract to the Department shall not operate to make the assignee responsible or liable for any breach of the Key Contract by Developer or for any amounts due and owing under the Key Contract for work or services rendered prior to assignment;

7.3.2.14 Subject to the Lender's rights under the Direct Agreement, expressly include a covenant acknowledging that, upon receipt of written notice from the Department, the Department is entitled to exercise step-in rights under this Agreement, without any necessity for a consent or approval from Developer or the making of a determination whether the Department validly exercised its step-in rights, and include a waiver and release by Developer of any claim or cause of action against the Key Contractor arising out of or relating to its recognition of the Department's rights in reliance on any such written notice from the Department;

7.3.2.15 Expressly include requirements that the Key Contractor (a) will maintain usual and customary books and records for the type and scope of operations of business in which it is engaged (e.g., constructor, equipment supplier, designer, service provider), (b) permit audit thereof by both Developer and the Department and (c) provide progress reports to Developer appropriate for the type of work it is performing sufficient to enable Developer to provide the reports it is required to furnish the Department under this Agreement;

7.3.2.16 Include the right of Developer to terminate the Key Contract in whole or in part upon any Termination for Convenience of this Agreement or any termination of this Agreement under Sections 19.3 or 19.5, in each case without liability of Developer or the Department for the Key Contractor's lost profits or business opportunity;

7.3.2.17 Not contain any terms that do not comply or are inconsistent with the terms of the Contract Documents, including terms that do not comply or are inconsistent with this Article 7 or with the applicable requirements of Section 21.1 regarding maintenance of books and records, that fail to incorporate the applicable California labor code requirements set forth in Appendix 19 or federal requirements set forth in Appendix 20, or that are inconsistent with the requirements of the relevant scope of Work; and

7.3.2.18 Expressly provide that any purported amendment with respect to any of the foregoing matters without the prior written consent of the Department shall be null and void.

7.3.3 Key Contract Amendments and Termination

7.3.3.1 Developer shall not amend any Key Contract with respect to any of the foregoing matters without the Department's prior written consent in its sole discretion.

7.3.3.2 Developer shall not terminate or permit termination of a Key Contract except (a) in the case of material uncured default by the Key Contractor, (b) termination of this Agreement and the Department's election not to assume the Key Contract, (c) if there occurs any suspension, debarment, disqualification or removal (distinguished from ineligibility due to lack of financial qualifications) of the Contractor, or there goes into effect an agreement for voluntary exclusion of the Contractor, from bidding, proposing or contracting with any federal, State or local department or agency, or (d) with the Department's prior written approval in its good faith discretion.

7.4 Key Personnel

7.4.1 Developer shall retain, employ and utilize the individuals specifically listed in Appendix 2-H or in the Project Management Plan to fill the corresponding Key Personnel positions listed therein. Developer shall not, prior to Substantial Completion, change or substitute any such individuals except due to retirement, death, disability, incapacity, or voluntary or involuntary termination of employment.

7.4.2 In such circumstances, Developer shall promptly propose a replacement for the Key Personnel position and notify the Department in writing of the proposed replacement. The Department shall have the right to review the qualifications and character of each individual to be appointed to a Key Personnel position (including personnel employed by Contractors to fill any such position) and to approve or disapprove use of such individual in such position prior to

the commencement of any Work by such individual.

7.4.3 Developer shall cause each individual filling a Key Personnel position to dedicate the full amount of time necessary for the proper preparation, prosecution and performance of the Work.

7.4.4 Developer shall provide the Department with phone and cell phone numbers and email addresses for all Key Personnel. The Department requires the ability to contact Key Personnel 24 hours per Day, seven Days per week.

7.5 Contracts with Affiliates

7.5.1 Developer shall have the right to have the Work performed by Affiliates only under the following terms and conditions:

7.5.1.1 Developer shall execute a written Contract with the Affiliate;

7.5.1.2 The Contract shall comply with all applicable provisions of this Article 7, be consistent with Best Management Practice, and be in form and substance substantially similar to Contracts then being used by Developer for similar work with unaffiliated Contractors;

7.5.1.3 The Contract shall set forth the scope of Work and all the pricing, terms and conditions respecting the scope of Work;

7.5.1.4 The pricing, scheduling and other terms and conditions of the Contract shall be no less favorable to Developer than those that Developer could reasonably obtain in an arms' length, competitive transaction with an unaffiliated Contractor. Developer shall bear the burden of proving that the same are no less favorable to Developer; and

7.5.1.5 No Affiliate shall be engaged to perform any Work which (a) any Contract Document indicates are to be performed by an independent or unaffiliated Contractor or (b) would be inconsistent with Best Management Practice.

7.5.2 Before entering into a written Contract with an Affiliate or any supplement or amendment thereto, Developer shall submit a true and complete copy of the proposed Contract to the Department for review and comment. The Department shall have [20] Days after receipt to deliver its comments to Developer. If the Contract with the Affiliate is a Key Contract, it shall be subject to the Department's approval as provided in Section 7.3.1.

7.5.3 Developer shall make no payments to Affiliates for work or services in advance of provision of such work or services, except for reasonable mobilization payments or other payments consistent with arm's length, competitive transactions of similar scope. Advance payments in violation of this provision shall be excluded from the calculation of Termination Compensation.

7.6 Labor Standards, Prevailing Wages, Nondiscrimination and Job Training

7.6.1 In the performance of its obligations under the Contract Documents, Developer at all times shall comply with, and require by contract that all Contractors and vendors comply with, all applicable federal and State labor, occupational safety and health Laws. Without limiting the

foregoing, Developer shall comply with all requirements of the California Labor Code and implementing regulations, including requirements with respect to prevailing wages, minimum wages, the 8-hour day and 40-hour week, overtime, Saturday, Sunday, and holiday work, nondiscrimination, and employment and training of apprentices as more specifically described in Appendix 19 attached to this Agreement. Developer shall forfeit to the Department the penalties prescribed in the California Labor Code for noncompliance, including the penalties set forth in Section 1813 for violations of Sections 1810 through 1815. The Department shall have the right to deduct such penalties from Milestone Payments and Availability Payments.

7.6.2 It is Developer's sole responsibility to determine the wage rates required to be paid. In the event rates of wages and benefits change while this Agreement is in effect, Developer shall bear the cost of such changes and shall have no Claim against the Department on account of such changes. Without limiting the foregoing, no Claim will be allowed which is based upon Developer's lack of knowledge or a misunderstanding of any wage rate requirements or Developer's failure to include in the Original Financial Model or Financial Model Updates adequate increases in such wages over the duration of this Agreement.

7.6.3 All individuals performing the Work shall at all times have the licenses or certifications required by Law, and shall possess the skill and experience necessary to fulfill the standards and requirements of the Contract Documents applicable to the Work assigned to them, including any applicable minimum levels of skill and experience set forth in Division I. In addition to any other rights and remedies under the Contract Documents, the Department shall have the right to require Developer to remove any person who lacks such skill, experience, licensing and certification, and such individual shall not be re-employed on the Work.

7.6.4 Developer shall comply with [Section ___ of Division ___] regarding on-the-job training. No later than [30] days prior to the start of the Construction Work, the Department will meet with Developer for a training evaluation meeting to finalize and agree upon the number of trainees, equal employment goals, proficiencies for selected training classifications, and the initial schedule for training.

7.6.5 During the performance of this Agreement, Developer shall not discriminate against any person or group of persons, including employees and applicants for employment, on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, sex or sexual orientation, except as otherwise provided in Section 12940 of the California Government Code.

7.6.6 Developer confirms for itself and all Contractors Developer and each Contractor has an equal employment opportunity policy ensuring equal employment opportunity without regard to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, sex or sexual orientation; and that Developer and each Contractor maintains no employee facilities segregated on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, age, sex or sexual orientation.

7.6.7 Developer shall include Sections 7.6.4 and 7.6.5 in every Contract to which Developer is a party, and shall require that they be included in all Contracts at lower tiers, so that such provisions will be binding upon each Contractor.

7.7 Ethical Standards

7.7.1 Within [90] days after the Effective Date, Developer shall adopt written policies establishing ethical standards of conduct for all Developer-Related Entities, including Developer's supervisory and management personnel in dealing with (a) the Department and (b) employment relations in connection with the Project. Such policy shall be subject to review and comment by the Department prior to adoption. Such policy shall include standards of ethical conduct concerning the following:

7.7.1.1 Restrictions on gifts and contributions to, and lobbying of, the Department and any of its commissioners, directors, officers and employees;

7.7.1.2 Protection of Developer's Project employees from unethical practices in selection, use, hiring, compensation or other terms and conditions of employment, or in firing, promotion and termination of employees;

7.7.1.3 Protection of Developer's Project employees from retaliatory actions (including discharge, demotion, suspension, threat, harassment, pay reduction or other discrimination in the terms and conditions of employment) in response to reporting of illegal (including the making of a false claim), unethical or unsafe actions or failures to act by any Developer-Related Entity;

7.7.1.4 Restrictions on directors, members, officers or supervisory or management personnel of any Developer-Related Entity engaging in any transaction or activity, including receiving or offering a financial incentive, benefit, loan or other financial interest, that is, or to a reasonable person appears to be, in conflict with or incompatible with the proper discharge of duties or independence of judgment or action in the performance of duties, or adverse to the interests of the Project or employees;

7.7.1.5 Restrictions on use of office or job position for a purpose that is, or would to a reasonable person appear to be, primarily for the private benefit of a director, member, officer or supervisory or management person, rather than primarily for the benefit of Developer or the Project, or primarily to achieve a private gain or an exemption from duty or responsibility for a director, member, officer or supervisory or management person; and

7.7.1.6 Adherence to the Department's organizational conflict of interest rules and policies applicable to the Project, as amended from time to time following written notice by the Department to Developer.

7.7.2 Developer shall cause its directors, members, officers and supervisory and management personnel, and require those of all other Developer-Related Entities, to adhere to and enforce the adopted policy on ethical standards of conduct for the Project. Developer shall establish reasonable systems and procedures to promote and monitor compliance with the policy.

7.7.3 No funds received from the Department pursuant to this Agreement may be expended for lobbying any Governmental Entity, including the State or Federal legislature, the judicial branch, any State agency, or any county, city or other Governmental Entity.

7.8 UDBE/DBE Program

7.8.1 The Department has an overall State-wide, race-neutral Underutilized Disadvantaged Business Enterprise ("**UDBE/DBE**") goal to spend at least []% of the funding

associated with highway contracts with certified UDBE/DBEs. Race-neutral means that the Department believes that the []% overall goal can be achieved through the normal competitive procurement process using UDBE/DBEs as prime contractors, subcontractors or subconsultants. Under 49 Code of Federal Regulations Part 26, if the Department's goal is not achieved, the Department may be required to return to a race-conscious program where goals are imposed on individual contracts that have federal funds.

7.8.2 In accordance with [Section ___ of Division ___], Developer shall comply with all applicable requirements in the UDBE/DBE Program and include provisions to implement the UDBE/DBE Program in every Contract to which it is a party. Further, Developer shall require that such provisions be included in all Contracts at lower tiers, so that such provisions will be binding upon each Contractor. Developer agrees to comply with the approved UDBE/DBE Affirmative Action Program Plan attached as Appendix 18.

ARTICLE 8. MANDATORY TECHNOLOGY ENHANCEMENTS AND SAFETY COMPLIANCE

8.1 Conditions Requiring Mandatory Technology Enhancements

Subject to Section 8.2, Developer at its expense shall be obligated to make Technology Enhancements on the systems it provides as and when necessary (a) to correct defects, (b) under the Renewal Work Schedule, (c) to meet the provisions of the Technical Requirements; and (d) to comply with changes and additions to, and replacements of, the Technical Requirements relating to the Work (collectively, "**Mandatory Technology Enhancements**").

8.2 Cost and Financing of Mandatory Technology Enhancements

8.2.1 Developer acknowledges and represents that the cost of Mandatory Technology Enhancements and future financing thereof are incorporated into the Financial Model. No Mandatory Technology Enhancement required to be performed prior to Substantial Completion shall entitle Developer to any claim against the Department.

8.2.2 Mandatory Technology Enhancements required to be performed after Substantial Completion, except those necessary to correct defects, may qualify as a Non-Discriminatory O&M Change or Discriminatory O&M Change, as applicable, under Section 5.2.2.

8.3 Safety Compliance

The Department is entitled from time to time to issue Safety Compliance Orders to Developer with respect to the Project to correct a specific safety condition or risk involving the Project that the Department has reasonably determined exists through investigation or analysis.

8.3.1 Safety Compliance Orders

8.3.1.1 The Department shall use good-faith efforts to inform Developer at the earliest practicable time of any circumstance or information relating to the Project which in the Department's reasonable judgment is likely to result in a Safety Compliance Order. Except in the case of an emergency, the Department shall consult with Developer prior to issuing a Safety Compliance Order concerning the risk to public or worker safety, alternative compliance measures, cost impacts, and the availability of Developer resources to fund the required Work.

8.3.1.2 Subject to conducting such prior consultation, the Department may issue Safety Compliance Orders to Developer at any time from and after the Effective Date.

8.3.2 Duty to Comply

8.3.2.1 Subject to Section 8.3.1, Developer shall implement all Safety Compliance as expeditiously as reasonably possible following issuance of the Safety Compliance Order. Developer shall diligently prosecute the work necessary to achieve such Safety Compliance until completion.

8.3.2.2 A Safety Compliance Order is a Relief Event which may entitle Developer to compensation, Completion Deadline extension, performance relief and other relief as provided in Article 9. Notwithstanding the provisions in this Section 8.3.2.2, Developer shall not be entitled to any compensation, time or Completion Deadline extension, performance relief or other claim against the Department to the extent that the Safety Compliance Order is the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity.

ARTICLE 9. DEVELOPER CLAIMS AND RELIEF EVENTS

9.1 Developer Claims

9.1.1 Claim Submission

9.1.1.1 If Developer believes that it is entitled to Extra Work Costs, Delay Costs, Completion Deadline extension, compensation for losses due to delays in commencement of Availability Payments, additional interest costs due to delayed receipt of a Milestone Payment or other relief under the Contract Documents, Developer shall submit a Claim and comply with the claims procedures and requirements as set forth in [Section __ of Division __].

9.1.1.2 Time is of the essence in Developer's delivery of Claims. Accordingly, if for any reason Developer fails to deliver a Claim:

1. Within 60 days following the date (herein the "starting date") on which Developer first became aware (or should have been aware, using all reasonable due diligence) of the occurrence of the Relief Event giving rise to the Claim, Developer shall be deemed to have irrevocably and forever waived and released the portion of any Claim or right to compensation, time, Financial Deadline or Completion Deadline extension or performance relief accruing after such 60-day deadline and until the date Developer submits the Claim; and
2. Within 180 days following the starting date, Developer shall be deemed to have irrevocably and forever waived and released any and all Claim or right to compensation, time, Financial Close Deadline or Completion Deadline extension or performance attributable to such Relief Event.

9.1.2 Claim Deductible

9.1.2.1 Except as provided in Section 9.1.2.2, each Claim seeking the recovery of Extra Work Costs and Delay Costs, as applicable, shall be subject to the Claim Deductible. The Claim Deductible reflects the Parties' agreement that: (a) Developer shall bear the financial risks for Extra Work Costs and Delay Costs, as applicable, for each Claim, up to the Claim Deductible; and (b) the Department will compensate Developer for Extra Work Costs and Delay Costs, as applicable, in excess of the Claim Deductible, provided that each Claim complies with [Section ___ of Division ___].

9.1.2.2 The Claim Deductible shall not apply to a Claim seeking recovery for the following:

1. Non-Discriminatory O&M Change, which is subject to the Non-Discriminatory O&M Change Deductible;
2. Department Change (other than a Non-Discriminatory O&M Change);
3. Department-Caused Delay;
4. Pre-existing Hazardous Materials, which is subject to the Pre-existing Hazardous Materials Deductible and the Tiered Pre-existing Hazardous Materials Deductible;
5. Extra Work Costs and Delay Costs directly attributable to a Seismic Event, which are subject to the Seismic Event Deductible;
6. Structural Latent Defects in the Phase I Construction;
7. Compensation under Sections 9.2.2 and 9.2.3; or
8. Department Default,

9.1.3 Seismic Event Deductible

9.1.3.1 Subject to the provisions in this Section 16.1.6 and Section 9.1.5, the Department shall, as of the Effective Date and continuing throughout the Term, pay for the Extra Work Costs and Delay Costs to repair or replace tangible property damage to the Project caused by Seismic Events. However, the Department shall not be responsible for tangible property damage to any tools, machinery, equipment, protective fencing, job trailers, scaffolding or other items used in the performance of the Work but not intended for permanent installation into the Project that is caused by Seismic Event.

9.1.3.2 Developer shall bear the first US\$_____ of Extra Work Costs and Delay Costs in the aggregate incurred during the Term to repair or replace tangible property damage to the Project caused by Seismic Events ("**Seismic Event Deductible**").

9.1.3.3 If tangible property damage to the Project is caused by Seismic Event, Developer shall, within [5] days of such occurrence, submit to the Department written notice thereof. Within [20] days of such notice, or such shorter or extended period of time as the parties agree is reasonable under the circumstances, Developer shall submit complete written

and photographic documentation supporting its Claim, and provide detailed quantification of the damages caused thereby. Such written documentation shall include detailed identification of the tangible property damage, the scope of necessary repair work, the proposed approach to performing the necessary repair work, and the projected costs of repair together with a supporting cost-loaded repair schedule. The Department shall within [20] days, or such shorter or extended period of time as the parties agree is reasonable under the circumstances, evaluate the documentation supplied by Developer and provide its provisional determination of the cost to repair the tangible property damage to the Project, which determination shall be subject to the Dispute Resolution Procedures. Developer shall comply with any Department request for explanation, elaboration or additional information reasonably necessary to facilitate the Department's analysis.

9.1.3.4 Unless specified otherwise by the Department, Developer shall comply with the requirements for performance of emergency repair work and maintenance of documents as set forth in Section 5.2.7 and other provisions of the Contract Documents.

9.1.4 CPI Adjustments to Deductibles

The amounts remaining in the Non-Discriminatory O&M Change Deductible, Pre-existing Hazardous Materials Deductible, Tiered Pre-existing Hazardous Materials Deductible, Seismic Event Deductible, and Claim Deductible shall be adjusted annually at the beginning of each Calendar Year after the Effective Date by a percentage equal to the percentage adjustment in the CPI between the CPI for October of the second immediately preceding Calendar Year and the CPI for October of the immediately preceding Calendar Year.

9.1.5 Insurance Deductible

Each Claim seeking the recovery of Extra Work Costs and Delay Costs, as applicable, shall be net of all insurance available to Developer, or deemed to be self-insured by Developer under Section 16.1.4.3, with respect to the Relief Event giving rise to the Extra Work Costs or Delay Costs. The amount of such insurance or deemed self-insurance shall be netted out before determining the amount of Extra Work Costs and Delay Costs to be charged against the Non-Discriminatory O&M Change Deductible, Pre-existing Hazardous Materials Deductible, Tiered Pre-existing Hazardous Materials Deductible, Seismic Event Deductible, or Claim Deductible, as the case may be.

9.2 Relief Events

9.2.1 General

Developer hereby acknowledges and agrees that the Milestone Payments and Availability Payments provide for full compensation for performance of all the Work, and the deadlines for performance of the Work specified in this Agreement provide reasonable and adequate time for performance, subject only to those rights to additional compensation, deadline extension and performance relief for Relief Events set forth in this Section 9.2 and other provisions of this Agreement specifying compensation, performance relief and deadline extension for Relief Events. The compensation amounts, deadline extensions and performance relief specified in this Section 9.2 and other provisions of this Agreement concerning Relief Events shall represent the sole right to compensation, damages, deadline extension and performance relief for the adverse financial and schedule effects of any event affecting the Work, the Project or Developer. Developer unconditionally and irrevocably waives the right to any Claim for any monetary compensation in addition to the Milestone Payments and

Availability Payments, or for deadline extension or performance relief, except in accordance with this Section 9.2 and other provisions of this Agreement specifying compensation, performance relief and deadline extension for Relief Events. The foregoing waiver encompasses all theories of liability, whether in contract, tort (including negligence), equity, quantum meruit or otherwise, and encompasses all theories to extinguish contractual obligations, including impracticability, mutual mistake and frustration of purpose. Nothing in the Technical Requirements shall have the intent or effect or shall be construed to create any right of Developer to any Claim for additional monetary compensation, time or deadline extension, performance relief or other relief, any provision in the Technical Requirements to the contrary notwithstanding. The foregoing provisions shall not preclude Developer's other remedies provided under the Contract Documents in the event of Department Default or upon termination of this Agreement prior to the stated expiration of the Term.

9.2.2 Delayed Availability Payments Due to Relief Events Before Operating Period Commencement

9.2.2.1 The Parties acknowledge that Developer may incur certain losses due to delays in commencement of Availability Payments by the Baseline Substantial Completion Date. For the delay in receiving Availability Payments beyond the Baseline Substantial Completion Date, the Department agrees to compensate Developer for its losses, but only to the extent such losses are caused by Relief Event Delays. Such compensation shall be calculated in accordance with the formula set forth in Section 9.2.2.2.

9.2.2.2 Subject to the other limitations set forth in this Section 9.2.2, the total compensation owed to Developer for the delay in receiving Availability Payments shall be as follows:

1. an amount equal to the greater of:
 - (a) [85]% of the MAP divided by 365, multiplied by the number of days of Relief Event Delays; or
 - (b) the lesser of the amount of: (i) debt service (except the repayment of principal scheduled to be funded by Milestone Payments which have been delayed by a Relief Event Delay) scheduled to be paid as shown in the Financial Model during the period commencing on the Baseline Substantial Completion Date and ending on the Scheduled Substantial Completion Date, prorated for the number of days of Relief Event Delays; (ii) the actual amount of debt service (except the repayment of principal scheduled to be funded by Milestone Payments which have been delayed by a Relief Event Delay) scheduled to be paid during such period, prorated for the number of days of Relief Event Delays; or (iii) the MAP divided by 365, multiplied by the number of days of Relief Event Delays;minus
2. the proceeds from any delayed start up or business interruption insurance policy procured to cover any loss of Availability Payment during the period commencing on the Baseline Substantial Completion Date and ending on the Scheduled Substantial Completion Date, prorated for the number of days of Relief Event Delays, excluding any insurance proceeds paid to Developer to cover the loss of the Availability Payment, if any, during the [90] day period

provided in Sections 9.2.2.3.

9.2.2.3 If a Deductible Relief Event causes a Relief Event Delay, no compensation shall be due or payable for the first [90] days of Relief Event Delays attributable to such Deductible Relief Event, and such deductible shall not be included in calculating the number of days of Relief Event Delays under Section 9.2.2.2. Such [90] day deductible shall be cumulative and apply in the aggregate for all Deductible Relief Events. If a Relief Event Delay is caused concurrently by a Deductible Relief Event and a non-Deductible Relief Event, such delay shall be deemed caused solely by the Deductible Relief Event.

9.2.2.4 In no event shall Developer be entitled to compensation under this Section 9.2.2 in excess of 270 days for Relief Event Delays in the aggregate. If Relief Event Delays exceed 270 days in the aggregate, the Parties' rights and remedies shall be as set forth in Section 19.3.

9.2.2.5 Compensation owed under this Section 9.2.2 shall be paid monthly, commencing on the last day of the month when Substantial Completion would have been achieved had the Relief Event Delays not occurred and continuing on the last day of each month thereafter until all compensation owed under this Section 9.2.2 is paid. The amount paid each month shall not exceed the amount of compensation owed for 30 days of Relief Event Delays, and any remaining amounts shall be paid in the subsequent month(s).

9.2.2.6 Notwithstanding any provision to the contrary, Developer shall not be entitled to any payments under this Section 9.2.2 under any of the following circumstances: (a) if Developer achieves Substantial Completion on or before the Baseline Substantial Completion Date; or (b) to the extent that payment for Relief Event Delays would compensate Developer for loss of Availability Payments earlier than the Baseline Substantial Completion Date.

9.2.2.7 Claims under this Section 9.2.2 shall be submitted and subject to the claims procedures and requirements set forth in [Section ___ of Division ___], and Developer shall be required to prove the existence, cause, effect, and timing of a Relief Event Delay in accordance with [Section ___ of Division ___].

9.2.3 Delayed Milestone Payments Due to Relief Events

9.2.3.1 If a Relief Event Delay extends Final Acceptance beyond the date scheduled in the initial Project Schedule included in Appendix 2-A, then subject to Section 9.2.3.2 Developer shall be entitled upon Final Acceptance to submit a Claim for the additional interest incurred resulting from a delay in making any Project Debt principal payment beyond the date scheduled in the Financial Model (before the occurrence of the Relief Event Delay), provided that (a) the date scheduled in the initial Project Schedule was reasonable for achieving Final Acceptance, (b) such Project Debt principal payment was scheduled to be funded by one or more Milestone Payments, (c) receipt of the applicable Milestone Payment was delayed by a Relief Event Delay, and (d) the delay in making such Project Debt principal payment was directly caused by the delayed receipt of the applicable Milestone Payment. The compensation owed under this Section 9.2.3 shall be calculated based on the number of days of Relief Event Delays (up to 270 days) multiplied by the daily interest charged for the relevant principal amount under the applicable Funding Agreement.

9.2.3.2 If a Deductible Relief Event causes a Relief Event Delay, no

compensation shall be due or payable for the first [90] days of Relief Event Delays attributable to such Deductible Relief Event, and such deductible shall not be included in calculating the number of days of Relief Event Delays under Section 9.2.3.1. Such [90] day deductible shall be cumulative and apply in the aggregate for all Deductible Relief Events. If a Relief Event Delay is caused concurrently by a Deductible Relief Event and a non-Deductible Relief Event, such delay shall be deemed caused solely by the Deductible Relief Event.

9.2.3.3 The compensation owed shall be reduced by the proceeds from any delayed start up or business interruption insurance policy procured to cover any extra cost of funds during the period of delay in payment of a Milestone Payment, excluding any insurance proceeds paid to Developer to cover the cost of funds during the [90] day period provided in Sections 9.2.3.2.

9.2.3.4 Claims under this Section 9.2.3 shall be submitted and subject to the claims procedures and requirements set forth in [Section ___ of Division ___], and Developer shall be required to prove the existence, cause, effect, and timing of a Relief Event Delay in accordance with [Section ___ of Division ___].

9.2.4 Certain Relief Events Causing Closures During Operating Period

If a Relief Event described in clause (a), (b), (j) (but only a violation by a third party), (k) (but only by a Governmental Entity), (l), (m), (n) (but only a third party release), (o), (q), (r), (t), (u) or (v) of the definition of Relief Event results in a Closure of one or more Segments, and Developer uses commercially reasonable efforts to mitigate the effects of such Relief Event and the resulting Closure, then solely for purposes clause (a) of the definition of Unavailability Event such a Closure shall not be deemed a Permitted Closure; provided that:

9.2.4.1 For up to the first 30 days that such Closure persists, plus any additional period that such Closure persists due to Developer's failure to use commercially reasonable efforts to mitigate the effects of such Relief Event and the resulting Closure, Developer shall be assessed 100% of the adjustment due to such (clause (a)) Unavailability Event as calculated under Appendix 7;

9.2.4.2 For up to the next 30 days that such Closure persists, Developer shall be assessed only 50% of the adjustment due to such (clause (a)) Unavailability Event as calculated under Appendix 7; and

9.2.4.3 For any further period that such Closure persists, Developer shall be assessed only 15% of the adjustment due to such (clause (a)) Unavailability Event as calculated under Appendix 7.

For the avoidance of doubt, such Relief Events may constitute Permitted Closures under the definition of Permitted Closure for all other purposes under this Agreement, including for determining a Developer Default under Section 18.1.1.18, determining Noncompliance Points, and determining an Unavailability Event under clause (b) of the definition thereof.

9.2.5 Deadline Extensions; Defense to Noncompliance Points, Deductions and Developer Default

9.2.5.1 The Financial Close Deadline may be extended by the period of delay in Developer's ability to achieve Financial Close that Developer cannot reasonably avoid

through mitigation as required under Section 9.2.6 and that is directly caused by a Relief Event set forth in clause (a), (g), (i) or (n) of the definition of Relief Event (Force Majeure Event, Department Change, Department-Caused Delay, certain violations of Law, certain court orders). The Financial Close Deadline will not be extended on account of any other Relief Event (notwithstanding any other provision of this Agreement to the contrary).

9.2.5.2 Developer shall be entitled to extension of applicable Completion Deadlines by the period of any Relief Event Delay that Developer cannot reasonably avoid through mitigation as required under Section 9.2.6, subject to satisfaction of any conditions or requirements set forth in the Contract Documents (e.g. Section 3.2.2.1 regarding Major Permit Delays; Section 4.5.8.1 regarding Utility Owner Delays).

9.2.5.3 Developer shall be entitled to rely upon the occurrence of a Relief Event as a defense against the accrual of Noncompliance Points, assessment of monetary deductions for Noncompliance and a Developer Default where the occurrence of the Relief Event would otherwise have caused such an accrual of Noncompliance Points, assessment of monetary deductions for Noncompliance or Developer Default, as the case may be.

9.2.5.4 Developer shall not be excused from compliance with the Contract Documents, applicable Laws or Governmental Approvals due to the occurrence of a Relief Event, except for its temporary inability to comply as a direct result of a Relief Event.

9.2.6 Mitigation

Developer shall take all steps necessary on a commercially reasonable basis to mitigate the consequences of any Relief Event, including all steps that would generally be taken in accordance with Best Management Practice. Without limiting the foregoing, Developer shall not be entitled to submit a claim for Extra Work Costs, Delay Costs, time or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief for impacts that could have been avoided through proper re-sequencing and re-scheduling of the Work.

9.2.7 Limitations Respecting Change in Law

9.2.7.1 A Nondiscriminatory O&M Change that the Department requires in order to comply with or implement a Change in Law shall be treated under this Agreement as a Change in Law.

9.2.7.2 In no event shall Developer be entitled to compensation for increases in costs of O&M Work, whether Extra Work Costs or Delay Costs, due to a Change in Law, except for capital costs of required major new improvements or required major repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element.

9.3 Method of Payment for Extra Work Costs and Delay Costs

9.3.1 The Department shall compensate Developer for amounts due for Extra Work Costs and Delay Costs (a) as periodic payments over the Term, (b) as an adjustment to the MAP over the Term, (c) as progress payments invoiced as Work is completed, (d) through an extension of the Term if the event giving rise to the Claim occurs after the Construction Period, or (e) through any combination of the above, as determined by the Department in its sole

discretion. Subject to Section 9.4.3, the Department shall pay for any Extra Work Costs and Delay Costs resulting from Department Changes as progress payments invoiced as Work is completed.

9.3.2 The Department shall provide Developer with a written notice of the method chosen for paying Developer for the amounts of Extra Work Costs and Delay Costs owed under this Article 9. The Parties shall conduct all discussions and negotiations to determine any compensation amount (including additional compensation amounts under Section 9.4, if any), and Developer shall provide the Department with all data, documents and information pertaining thereto, on an Open Book Basis.

9.3.3 In exchange for the payment by the Department of any such compensation amounts (and additional compensation amounts under Section 9.4, if any), Developer shall execute a full, unconditional, irrevocable waiver, release and acknowledgement of satisfaction by Developer, in form reasonably acceptable to the Department, of any claim for Extra Work Costs, Delay Costs, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, and other rights to compensation or other monetary relief associated with such event that is not the subject of a Dispute.

9.4 Restoration of Financial Balance for Deferral of Compensation

9.4.1 If the Department elects to compensate Developer through Deferral of Compensation, Developer shall be entitled to additional compensation to restore the losses in Equity IRR and debt service ratios in the Financial Model as a result of the Deferral of Compensation.

9.4.2 Developer shall provide the Department with the total amount of compensation that Developer considers owed to restore the Equity IRR and debt service ratios in the Financial Model as a result of the Deferral of Compensation, including supporting calculations and documentation. In no event shall Developer be entitled to any compensation for losses unrelated and not directly caused by the Deferral of Compensation.

9.4.3 If through mutual consent of the Parties, the Department is to compensate Developer through Deferral of Compensation for any Extra Work Costs and Delay Costs resulting from a Department Change, the Equity IRR assumed to be earned on the additional invested equity in connection with the Department Change shall be equal to [XXXXX] %.

9.5 Disputes Related to Claims and Relief Events

Any Dispute as to whether Developer is entitled to Extra Work Costs, Delay Costs, other compensation, Financial Close Deadline or Completion Deadline extensions or other relief as provided in this Article 9 shall be resolved according to the Dispute Resolution Procedures. If the Department disagrees with an amount of compensation or deadline extension sought by Developer, the Department shall pay the undisputed portion of compensation and allow the undisputed portion of Financial Close Deadline or Completion Deadline extension, and the disputed portion shall be resolved according to the Dispute Resolution Procedures.

ARTICLE 10. CHANGES IN THE WORK

10.1 Department Changes

10.1.1 The Department reserves the right to make alterations or changes in the Work (including reductions in the scope of the D&C Work up to a cap of [10]% of the Design and Construction Costs as set forth in the Schedule of Values) pursuant to [Section ___ of Division ___] or in terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work). Such alternations and changes shall be documented through issuance of a Department Change or other written directive signed by the Department's Authorized Representative or by his/her designee appointed in writing.

10.1.2 If Developer believes it is entitled to additional compensation, a Financial Close Deadline or Completion Deadline extension or other relief for Extra Work which is directed by the Department, Developer shall submit a Claim in accordance with Section 9.1. Compensation and Financial Close Deadline or Completion Deadline extension for Extra Work shall be subject to all deductibles set forth in this Agreement and to all other terms and conditions of the Contact Documents.

10.1.3 If the Department Change results in a reduction to the scope of the Work, the Department shall be entitled to

10.1.3.1 [50]% of the net reduction in direct labor, material and equipment costs associated with the Department Change, which shall be paid by the Developer to the Department: (a) as periodic payments over the Term; (b) as an adjustment to the MAP over the Term; (c) through a reduction in the Term; or (d) through any combination of the above, as mutually agreed upon by the Parties; plus

10.1.3.2 . [50]% of the net reduction in direct labor, materials and equipment costs associated with the Department Change as a credit against the Department's liability for Extra Work Costs during the Term.

10.2 Developer Change Proposals

10.2.1 Developer may, by submittal of a written Change Proposal using a form approved by the Department, request the Department to (a) approve modifications to the Technical Requirements, (b) approve modifications to Developer's Proposal Commitments , or (c) approve adjustments to the Project Right of Way, Staging Areas, Construction Period O&M Limits or Operating Period O&M Limits identified in Appendix 5. The Department will not consider any Change Proposals under subpart (c) of this Section 10.2.1 that are submitted later than [XXXXXXXXXXXXX]. The Change Proposal shall set forth Developer's detailed estimate of net cost impact (positive or negative) and schedule impact of the requested change.

10.2.2 The Department, in its sole discretion may accept or reject any Change Proposal submitted by Developer pursuant to Section 10.2.1. No acceptance shall be deemed to take effect unless documented in writing signed by the Department's Authorized Representative or by his/her designee appointed in writing. No such acceptance shall constitute a Department Change regardless of its title, designation or wording. If such Change Proposal is accepted by the Department, Developer shall implement the change in accordance with all applicable requirements contained in the Contract Documents (as amended to reflect the Department-approved Change Proposal, if applicable), the Project Management Plan, Best Management

Practice, and all applicable Laws.

10.2.3 Developer shall be solely responsible for payment of any increased Design and Construction Costs, finance or other costs, additional risks, and any Project Schedule delays or other impacts resulting from a Change Proposal accepted by the Department.

10.2.4 To the extent a change under Section 10.2.1(a) or (b) results in a cost savings to Developer, the Department shall be entitled to [50]% of the savings related to the direct labor, materials and equipment costs associated with the change. The Department shall obtain its share of the savings in the manner described in Section 10.1.3.1.

10.2.5 To the extent a change under Section 10.2.1(c) results in a reduction in the number of parcels identified in Appendix 5 necessary for the construction or operation and maintenance of the Project and does not require a modification to the Project configuration nor affect any elements or functionality as set forth in the Technical Requirements, Developer shall share in [50]% of the savings to the Department in real estate costs. However, Developer shall not be entitled to a share in any savings in real estate costs if a change under Section 10.2.1(c) requires a modification to the Project configuration or affects any elements or functionality as set forth in the Technical Requirements. The Department shall pay any amounts due to Developer under this Section 10.2.5 upon submission of a signed payment request setting forth the parcel or parcels to which it is entitled to share in savings. Such payment request may be submitted no earlier than the Substantial Completion Date.

10.2.6 For any Change Proposal accepted by the Department, the Department shall be entitled to the full savings related to the financing costs associated with any Design and Construction Cost savings. The Department shall obtain the savings in the manner described in Section 10.1.3.1.

10.2.7 No Change Proposal shall be required to implement any change to the Work that is not specifically regulated or addressed by the Contract Documents, applicable Law or Governmental Approvals.

ARTICLE 11. PAYMENTS TO DEVELOPER

11.1 Timing and Basis for Availability Payments

11.1.1 Upon Substantial Completion of the Project, the Department will begin making Availability Payments to Developer as provided in this Article 11. Developer is not entitled to earn any Availability Payments before the Early Completion Date.

11.1.2 The Availability Payments are based on the Project being open and available for public travel as measured through Developer's conformance with the Contract Documents, including the minimum operating and maintenance requirements set forth in [Section ___ of Division ___].

11.2 Availability Payment Calculation and Invoicing

11.2.1 Calculation of Availability Payment

11.2.1.1 Availability Payments shall be calculated and earned by

Developer according to the methodology set forth in Appendix 7. The Availability Payments payable during any given Fiscal Year during the Operating Period shall never exceed the MAP for that year, adjusted for inflation, as described in Appendix 7.

11.2.1.2 Each Availability Payment constitutes a single, all-inclusive payment with no fixed component and no separation of payments for operations, capital, maintenance, Renewal Work, Handback Renewal Work or Upgrades. In addition to any other deductions or withholdings allowed under this Agreement, the Availability Payments shall be subject to adjustment for Unavailability Events in accordance with Appendix 7. Developer acknowledges that such adjustments to the Availability Payments are reasonable liquidated damages in order to compensate the Department for damages it will incur by reason of Developer's failure to comply with the performance standards applicable to the Operating Period. Such damages include:

1. The Department's increased costs of administering this Agreement, including the increased costs of engineering, legal, accounting, monitoring, OCIP insurance, oversight and overhead, and could also include obligations to pay or reimburse Governmental Entities with regulatory jurisdiction over the Project for violation of applicable Governmental Approvals or for their increased costs of monitoring and enforcing Developer's compliance with applicable Governmental Approvals;
2. Potential harm and future costs to the Department from reduction in the condition and useful life of the Project;
3. Potential harm to the credibility and reputation of the Department's transportation improvement program with other Governmental Entities, with policy makers and with the general public who depend on and expect availability of service;
4. Potential harm and detriment to Users, which may include loss of the use, enjoyment and benefit of the Project and of facilities connecting to the Project, additional wear and tear on vehicles and increased costs of congestion, travel time and accidents;
5. Loss of economic benefits by other Governmental Entities owning and operating transportation facilities that connect to or are affected by the Project; and
6. The Department's increased costs of addressing potential harm to the Environment, including increased harm to air quality caused by congestion, and harm to water quality, soils conditions, historic structures and other environmental resources caused by adjustment factors set forth in Appendix 7.

11.2.1.3 Developer further acknowledges that these damages would be difficult and impracticable to measure and prove, because, among other things, (a) the Project is of a unique nature and no substitute for it is available, (b) the costs of monitoring and oversight prior to increases in the level thereof will be variable and extremely difficult to quantify, (c) the nature and level of increased monitoring and oversight will be variable depending on the circumstances, and (d) the variety of factors that influence use of and

demand for the Project make it difficult to sort out causation of the matters that will trigger these liquidated damages and to quantify actual damages.

11.2.2 Invoicing

11.2.2.1 The Availability Payments shall be payable in Quarterly Payments. The Department shall pay Developer a Quarterly Payment within 30 days after the Department receives a proper invoice for the applicable Quarter that meets the requirements of this Section 11.2.2. The 30-day period within which to make payment of a Quarterly Payment shall not begin until Developer submits and the Department receives a proper invoice therefor in accordance with this Section 11.2.

11.2.2.2 Developer shall submit the invoice no later than 30 days after the end of the prior Quarter. The invoice must set forth the amount and calculation of the Quarterly Payment due, including the calculation of the Quarterly Payment Adjustment for all applicable Unavailability Events in accordance with Appendix 7, if any. In addition, the invoice must be accompanied by an attached report containing information that the Department can use to verify the Quarterly Payment and all components of the Quarterly Payment Adjustment for Unavailability Events for the prior Quarter. Such attached report shall include (a) the calculation of the actual Availability Payment earned during the prior Quarterly using the methodology set forth in Appendix 7 for determining the Quarterly Payment Adjustment, (b) a description of any Unavailability Events, including the date and time of occurrence and duration, (c) any adjustments to reflect previous over-payments and/or under-payments, and (d) any other amount due and payable from Developer to the Department or from the Department to Developer under this Agreement, including deductions the Department is entitled to make under Section 5.10.2.5 (Monthly Handback Reserve Deposit) and Section 6.4 (Noncompliance Points). Developer shall set forth and submit in a separate invoice any interest payable in respect of any amounts owed. The Department shall return any invoices that are incomplete and/or incorrect in any material respect to Developer for correction and resubmission.

11.2.2.3 The Department will verify the amount of each Quarterly Payment by (a) examining the invoice for the applicable Quarter, (b) verifying the results reported therein by Developer, including through the Department's independent oversight and auditing process, and (c) reconciling the actual Quarterly Payment earned and any other amount due and payable from Developer to the Department or from the Department to Developer under this Agreement.

11.2.2.4 The Department shall not be required to pay any quarterly invoice if Developer has failed to file the reports required to be filed for that Quarter as required by Section 4 of Division II, unless and until the required report is filed. If it is determined that any quarterly report required to be filed pursuant to Section 4 of Division II is found to be inaccurate, which, had it been accurate, would have revealed that an Unavailability Event or Noncompliance had occurred, then the Department shall not be required to pay any quarterly invoice submitted by Developer unless and until Developer submits to the Department a revised report which is accurate to the reasonable satisfaction of the Department. Once the required or revised reports are filed, the Department shall process the quarterly invoice for payment. The failure to file a quarterly report or the filing of an inaccurate report may result in the assessment of Noncompliance Points.

11.3 Disputed Amounts

11.3.1 Either Developer or the Department shall have the right to dispute, in good faith, any amount specified in an invoice submitted pursuant to this Article 11. The Party disputing any such amount shall pay the amount of the invoice in question that is not in dispute and is entitled to withhold the balance pending resolution of the Dispute.

11.3.2 Developer and the Department shall use their reasonable efforts to resolve any such Dispute within [30] days after the Dispute arises. If they fail to resolve the Dispute within that period, then the Dispute shall be resolved according to the Dispute Resolution Procedures.

11.3.3 Any amount determined to be due pursuant to the Dispute Resolution Procedures will be paid within [20] days following resolution of the Dispute, together with interest thereon in accordance with Section 11.4.3.

11.4 Interest on Payments

11.4.1 Interest on undisputed amounts owed to Developer under this Agreement, and interest on amounts payable to Developer in settlement of a Dispute before final binding decision under Dispute Resolution Procedures, shall be in accordance with the requirements set forth in Public Contract Code Section 10261.5.

11.4.2 If as a result of any inaccuracy in an invoice any overpayment is made by the Department to Developer then, in addition to the adjustments to a Quarterly Payment as provided in Section 11.2.2.2, the Department shall be entitled to deduct or receive as a payment from Developer interest thereon at the Late Payment Rate from the date of payment of the invoice by the Department to the date the overpayment is deducted or paid. The right of the Department to deduct the interest from the Quarterly Payment and/or to receive a payment from Developer is without prejudice to any other rights the Department may have under this Agreement.

11.4.3 Amounts determined to be due pursuant to the Dispute Resolution Procedures shall accrue interest at the Late Payment Rate.

11.5 Appropriations and Budgeting of Payments

11.5.1 The Parties hereto acknowledge that the source of funds for payment of the Availability Payments, the Milestone Payments and other amounts due to Developer under this Agreement is subject to the availability of funds appropriated by the State legislature and approved by the State governor. The Department shall include the Maximum Availability Payment and the Milestone Payments in its proposed State Transportation Improvement Program Fund Estimate for adoption by the California Transportation Commission and in its legislative budget request prepared in accordance with the Budget Acts and Executive Orders of the years covered by this Agreement.

11.5.2 The Department agrees to prioritize milestone and annual payments relating to public-private partnerships, including those related to the Project, ahead of new capacity projects in the development and updating of the Department's State Transportation Improvement Program Fund Estimate submitted to the California Transportation Commission for adoption. The Department shall, so long as this Agreement is in effect and any portion of the TIFIA Loan is outstanding, provide an annual report to Developer and USDOT regarding: (a)

whether the then-current year's payments due under this Agreement have been duly appropriated; and (b) the inclusion of subsequent year's payments due under this Agreement in the Department's State Transportation Improvement Program Fund Estimate submitted to the California Transportation Commission for adoption. So long as the TIFIA Loan is outstanding, USDOT shall be a third-party beneficiary of this Section 11.5.2.

11.5.3 Nothing in this Section 11.5 shall prejudice Developer's right to declare a Department Default under Section 18.3.1.1.

11.6 Tolling

11.6.1 Developer shall be authorized to impose tolls and user fees for use of the Project subject to prior compliance with and satisfaction of all of the following conditions:

11.6.1.1 Developer shall give to the Department written notice of its intent to exercise the right to impose toll and user fees, as well as the Developer's proposed schedule of toll rates or user fee rates and plan to construct and operate the toll collection facilities;

11.6.1.2 Developer shall obtain the approval of the Golden Gate Bridge Highway and Transportation District, the Metropolitan Transportation Commission, and the Authority to (a) the exercise of such authority to impose tolls and user fees and (b) the toll rates or user fee rates, which approval shall be governed by and consistent with the requirements of that certain Memorandum of Understanding ("MOU") dated November 26, 2008;

11.6.1.3 Developer's exercise of the right to impose tolls and user fees as provided in this Section 11.6.1 shall not affect, alter or supersede the MOU;

11.6.1.4 Developer must obtain all necessary Environmental Approvals and governmental permits required in order to exercise the right to impose tolls and user fees, including compliance with all legal requirements including CEQA and NEPA requirements;

11.6.1.5 Developer shall obtain the prior written approval of the Department in its good faith discretion to (a) the toll rates or user fee rates, which approval shall be consistent with the approvals given as provided in Section 11.6.1.2; and (b) amendments or supplements to the Technical Requirements establishing the standards and specifications for the design, construction, operation and maintenance of the tolling system;

11.6.1.6 The Department and the Authority have agreed on (a) the use and disposition of excess toll and user fee revenue payable to Department under Section 11.6.3, consistent with Streets and Highways Code Section 143(j)(1), and (b) amendments to this Agreement to take into account the impact of toll revenues on compensation for Relief Events and the measurement of Termination Compensation; ;and

11.6.1.7 Section 143(q) of the Streets and Highways Code is (a) repealed, (b) amended to not preclude tolling of the Project or (c) determined by the Department or a court of competent jurisdiction to not apply to the Project.

11.6.2 In the event Developer decides to exercise the right to impose tolls and user fees as provided in this Section 11.6, the Department shall be relieved of its obligation to make Availability Payments as provided in Article 11 in an amount equal to the gross amount of tolling

and user fees received by the Developer. All adjustments to Availability Payments for Unavailability Events and O&M Noncompliance Events shall continue to be calculated in accordance with Appendix 7, and the excess thereof (if any) over the amount of any Availability Payment remaining due (if any) shall be due and payable to the Department, as liquidated damages, on the same date that each invoice and attachment is required to be delivered to the Department under Section 11.2.2.2.

11.6.3 In the event Developer decides to exercise the right to impose tolls and user fees as provided in this Section 11.6, Developer shall pay to the Department [85]% of all toll revenues received each month which exceed in amount the Availability Payments that would be owing to Developer (assuming no adjustments for Unavailability Events and O&M Noncompliance Events) had Developer not exercised its authority to toll set forth in this Section 11.6. Such payments to the Department shall constitute the excess toll or user fee revenue governed by Streets and Highways Code Section 143(j)(1), shall not be available to Developer or its Lenders, and shall be subject to disposition as determined by the Department and the Authority.

11.6.4 In the event Developer decides to exercise the right to impose tolls and user fees as provided in this Section 11.6, the tolling system shall be an open road, barrier-free, electronic tolling system that does not interrupt the flow of traffic on the Project or its approaches.

ARTICLE 12. LENDERS' RIGHTS

12.1 Conditions and Limitations Respecting Lenders' Rights

12.1.1 No Funding Agreement or related Security Document shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless the Funding Agreement and related Security Document strictly comply with Section 15.4.

12.1.2 No Funding Agreement or Security Document relating to any Refinancing shall be valid or effective, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless the Refinancing is in compliance with Section 15.4.

12.1.3 No Funding Agreement or Security Document shall be binding upon the Department in the enforcement of its rights and remedies as provided herein and by Law, and no Lender shall be entitled to the rights, benefits and protections of this Article 12 or the Direct Agreement, unless and until the Department has received a copy (certified as true and correct by the Collateral Agent) of the original thereof bearing, if applicable, the date and instrument number or book and page of recordation or filing thereof, including a copy of a specimen bond, note or other obligation (certified as true and correct by the Collateral Agent) secured by such Security Document, together with written notice of the address of the Collateral Agent to which notices may be sent. In the event of an assignment of any such Funding Agreement or Security Document, such assignment shall not be binding upon the Department unless and until the Department has received a certified copy thereof, which copy shall, if required to be recorded, bear the date and instrument number or book and page of recordation thereof, together with written notice of the assignee thereof to which notices may be sent. In the event of any change in the identity of the Collateral Agent, such change shall not be binding upon the Department unless and until the Department has received a written notice thereof signed by the replaced and substitute Collateral Agent and setting forth the address of the substitute Collateral Agent to

which notices may be sent.

12.1.4 No Lender shall be entitled to the rights, benefits and protections of this Article 12 unless the Funding Agreements in favor of the Lender are secured by senior or first tier subordinate Security Documents, including any first tier subordinate security interest that is extended in connection with Project Debt provided under the U.S. Department of Transportation's Transportation Infrastructure Finance and Innovative Act (TIFIA) program, and the Department shall only enter into Direct Agreements with such Lenders. For avoidance of doubt, no Lender holding Project Debt secured by an Equity Members Security Document shall have any rights, benefits or protections under this Article 12 and the Department shall not be required to enter into a Direct Agreement with such a Lender.

12.1.5 All rights acquired by Lenders under any Funding Agreement or Security Document shall be subject to the provisions of this Agreement and the Lease and to the rights of the Department hereunder and thereunder.

12.1.6 A Lender shall not, by virtue of its Funding Agreement or Security Document, acquire any greater rights to or interest in the Project, the Lease or payments from the Department under this Agreement than Developer has at any applicable time under this Agreement, other than the provisions in this Article 12 for the specific protection of Lenders and in the Direct Agreement.

12.1.7 To further evidence the rights, benefits and protections afforded to Lenders, the Department will enter into a Direct Agreement at a Lender's request.

12.2 Effect of Amendments

Subject to Article 10, while any Security Document is in effect, no agreement between the Department and Developer for the modification or amendment of this Agreement that in any way could reasonably be expected to have a material adverse effect on the rights or interests of the Lender(s) shall be binding on the Lender(s) under such Security Document without the Collateral Agent's consent.

12.3 Notices to Collateral Agent

As long as any Project Debt secured by any Security Document shall remain outstanding, the Department shall promptly provide the Collateral Agent with a copy of any notice it sends to Developer concerning an actual or potential Developer Default, including Warning Notices.

12.4 Opportunity to Cure and Step-In

As long as any Project Debt secured by any Security Document shall remain outstanding and the conditions and limitations of Section 12.1 are satisfied, the following provisions shall apply with respect to any such Security Document and the related Lender or Lenders and Funding Agreements.

12.4.1 Upon the occurrence of a Developer Default and expiration of the relevant cure period, if any, without a full or complete cure, the Department shall not terminate this Agreement until it first delivers to the Collateral Agent notice of its intent to terminate and provides the Collateral Agent a reasonable opportunity to cure such Developer Default, as provided in the

Direct Agreement. The Lenders shall have the right (but not the obligation) to remedy such Developer Default or cause the same to be remedied by a Substituted Entity; and the Department shall deem such performance by or at the instigation of the Lender or Substituted Entity as if the same had been done by Developer, as provided in the Direct Agreement.

12.4.2 Any curing of any Developer Default by the Collateral Agent shall not be construed as an assumption by the Collateral Agent of any obligations, covenants or agreements of Developer under the Contract Documents, except that the Collateral Agent shall be responsible for the work, services and actions taken or performed by or on behalf of the Collateral Agent.

12.4.3 Except as set forth in this Agreement or in the Direct Agreement, the Department shall not be precluded from or delayed in exercising any remedies, including termination of this Agreement due to the accumulation of Noncompliance Points during the step-in period by the Collateral Agent and the Department's rights to cure Developer Default at Developer's expense; provided, however, the Department shall not be entitled to exercise its right of termination due to Noncompliance Points accumulated prior to such step in; provided the Collateral Agent is curing the Noncompliance that resulted in such Noncompliance Points as quickly as practicable using commercially reasonable efforts. Once all instances of Noncompliance have been cured, the Department shall cancel any Noncompliance Points accrued prior to such step-in.

12.5 Substituted Entities

12.5.1 Any payment to be made or action to be taken by the Collateral Agent as a prerequisite to keeping this Agreement in effect shall be deemed to have been made or taken by the Collateral Agent if such payment is made or action is taken by a Substituted Entity proposed by the Collateral Agent and reasonably approved by the Department. The Department shall have no obligation to recognize any claim to Developer's Interest by any person or entity that has acquired Developer's Interest by, through, or under any Security Document or whose acquisition shall have been derived immediately from any holder thereof, unless such person or entity is a Substituted Entity reasonably approved by the Department.

12.5.2 The Department shall have no obligation to approve a person or entity as a Substituted Entity unless the Lender demonstrates to the Department's reasonable satisfaction that: (a) the proposed Substituted Entity and its contractors collectively have the financial resources, qualifications and experience to timely perform Developer's obligations under the Contract Documents and Key Contracts; (b) the proposed Substituted Entity and its contractors, each of their respective direct and indirect beneficial owners, any proposed key personnel, each of their respective officers and directors and each of their respective affiliates have a good and sound background and reputation (including (i) the absence of criminal, civil or regulatory claims or actions against any such Person, (ii) the absence of any suspension or debarment from bidding, proposing or contracting with any federal or State department or agency, and (iii) each such Person's adherence to Best Management Practice, contract terms and applicable standards regarding past or present performance on other Department projects); and (c) the proposed Substituted Entity and its contractors are in compliance with the Department's rules, regulations and adopted written policies regarding organizational conflicts of interest. The Department will approve or disapprove a proposed Substituted Entity within [60] days after it receives from the Lender a request for approval together with: (i) such information, evidence and supporting documentation concerning the identity, financial resources, qualifications, experience and potential conflicts of interest of the proposed Substituted Entity and its contractors as the Department may reasonably request; and (ii) such evidence of organization,

authority, incumbency certificates, certificates regarding debarment or suspension, and other certificates, representations and warranties as the Department may reasonably request. The Department will evaluate the financial resources, qualifications, experience and potential conflicts of interest of the proposed Substituted Entity and its contractors using the same standards and criteria that it is then currently applying, or if there is no current application, then the same standards and criteria it most recently applied, to the evaluation of Persons responding to Department requests for qualifications for concession or similar agreements for comparable projects and facilities. If for any reason the Department does not act within such [60]-day period, or any extension thereof by mutual agreement of the Department and the Lender, the Department shall be deemed to approve of the Substituted Entity. Notwithstanding the foregoing, any entity that is wholly owned by a Lender or group of Lenders shall be deemed a Substituted Entity, without necessity for Department approval, upon delivery to the Department of documentation proving that the entity is duly formed, validly existing and wholly owned by the Lender, including a certificate signed by an executive officer of each Lender in favor of the Department certifying, representing and warranting such ownership.

12.5.3 A Lender may request approval of more than one Substituted Entity. A Lender may request approval at any time or times. Any approval by the Department of a Substituted Entity shall expire (unless otherwise agreed in writing by the Department) one year after the approval is issued if the Substituted Entity has not succeeded to Developer's Interest within that period of time. The Department may revoke an approval if at any time prior to succeeding to Developer's Interest (a) the Substituted Entity ceases to be in compliance with the Department's rules and regulations regarding organizational conflicts of interest or (b) there occurs any suspension or debarment of the Substituted Entity, any of its contractors, any of their respective direct and indirect beneficial owners, any proposed key personnel, any of their respective officers and directors or any of their respective affiliates from bidding, proposing or contracting with any federal or State department or agency. If the Substituted Entity succeeds to Developer's Interest, then the Department shall not be entitled to terminate due to Noncompliance Points accumulated by Developer prior to its replacement by the Substituted Entity, provided the Noncompliance that resulted in such Noncompliance Points are being cured by the Substituted Entity as quickly as practicable using commercially reasonable efforts. Once all instances of Noncompliance have been cured, the Department shall cancel any Noncompliance Points accrued prior to succession.

12.6 Receivers

12.6.1 The appointment of a receiver at the behest of Developer shall be subject to the Department's prior written approval in its sole discretion. The appointment of a receiver at the behest of any Lender shall be subject to the following terms and conditions:

12.6.1.1 The Department's prior approval shall not be required for the appointment of the receiver or the selection of the Person to serve as receiver;

12.6.1.2 Whenever any Lender commences any proceeding for the appointment of a receiver, it shall serve on the Department not less than [five] days' prior written notice of the hearing for appointment and of the Lender's pleadings and briefs in the proceeding;

12.6.1.3 The Department may appear in any such proceeding to challenge the selection of the Person to serve as receiver, but waives any other right to oppose the appointment of the receiver; and

12.6.1.4 The Department may at any time seek an order for replacement of the receiver by a different receiver.

12.6.2 No receiver appointed at the behest of Developer or any Lender shall have any power or authority to replace the Lead Contractor or the Lead Operations and Maintenance Firm except by reason of default or unless the replacement is a Substituted Entity reasonably approved or deemed approved by the Department.

12.7 Other Lender Rights

Provided that the conditions and limitations of Section 12.1 are fully satisfied, the following provisions shall apply.

12.7.1 In addition to all other rights herein granted, the Lender shall have the same rights as Developer under this Agreement with respect to curing any Developer Default. The Department shall permit the Collateral Agent and its Substituted Entity the same access to the Project and Project Right of Way as is permitted to Developer hereunder. The Department hereby consents to Developer constituting and appointing any Collateral Agent as Developer's authorized agent and attorney-in-fact with full power, in Developer's name, place and stead, and at Developer's sole cost and expense, to enter upon the Project and Project Right of Way and to perform all acts required to be performed herein and in any Key Contracts, but only in the event of a Developer Default or a default under the Lender's Funding Agreement or Security Document. The Department shall accept any such performance by or on behalf of the Collateral Agent as though the same had been done or performed by Developer.

12.7.2 The creating or granting of a Security Document shall not be deemed to constitute an assignment or transfer of this Agreement or Developer's Interest, nor shall any Lender, as such, be deemed to be an assignee or transferee of this Agreement or Developer's Interest so as to require such Lender, as such, to assume the performance of any of the terms, covenants or conditions on the part of Developer to be performed hereunder or thereunder. No Lender, nor any owner of Developer's Interest whose ownership shall have been acquired by, through, or under any Security Document or whose ownership shall have been derived immediately from any holder thereof, shall become liable under the provisions of this Agreement unless and until such time as the Lender or such owner becomes the owner of Developer's Interest. Upon any permitted assignment of this Agreement and Developer's Interest by a Lender or any owner of Developer's Interest whose ownership shall have been acquired by, through, or under any Security Document or whose ownership shall have been derived immediately from any holder thereof, the assignor shall be relieved of any further liability which may accrue hereunder or thereunder from and after the date of such assignment, provided that the assignee is a Substituted Entity and executes and delivers to the Department an assumption agreement as required under Section 23.1.1.2.

12.7.3 The Department consents to the exercise by Lender of its rights with respect to Developer's Interest under its Security Documents, this Article 12, the Direct Agreement or otherwise, whether by judicial proceedings or by virtue of any power contained in the Security Documents, or by any conveyance from Developer to Lender in lieu of foreclosure thereunder, or any subsequent transfer from Lender to a Substituted Entity. The foregoing does not affect the obligation to obtain approval of Persons as Substituted Entities pursuant to Section 12.5.

12.7.4 Whenever the Department or Developer obtains knowledge of any condemnation proceedings affecting the Project or Project Right of Way, it shall promptly give notice thereof to the Collateral Agent. Each Lender shall have the right to intervene and be made a party to any such condemnation proceedings, and the Department and Developer do hereby consent that each Lender may be made such a party or an intervener.

12.7.5 No mutual agreement to cancel or surrender this Agreement or the Lease shall be effective unless consented to in writing by the Collateral Agent, which consent Developer shall be solely responsible to obtain.

12.8 Estoppel Certificates

12.8.1 At any time and from time to time, within [15] days after written request of any Lender or proposed Lender, the Department, without charge and based upon its knowledge, shall certify by written instrument duly executed and acknowledged, to any Lender or proposed Lender as follows:

12.8.1.1 As to whether this Agreement has been supplemented or amended, and if so, the substance and manner of such supplement or amendment, attaching a copy thereof to such certificate;

12.8.1.2 As to the validity and force and effect of this Agreement, in accordance with its terms;

12.8.1.3 As to the existence of any Developer Default of which it has knowledge;

12.8.1.4 As to the existence of events which, by the passage of time or notice or both, would constitute a Developer Default of which it has knowledge;

12.8.1.5 As to the then accumulated amount of Noncompliance Points;

12.8.1.6 As to the existence of any Claims by the Department regarding this Agreement;

12.8.1.7 As to the Effective Date and the commencement and expiration dates of the Term;

12.8.1.8 As to whether a specified acceptance, approval or consent of the Department called for under this Agreement has been granted;

12.8.1.9 Whether the Lender and its Security Documents, or the proposed Lender and its proposed Security Documents, meet the conditions and limitations set forth in Section 12.1; and

12.8.1.10 As to any other matters of fact relating to this Agreement as may be reasonably requested.

12.8.2 The Department shall deliver the same certified, written instrument to a Substituted Entity or proposed Substituted Entity within [15] days after receiving its written request, provided that the request is delivered to the Department either before the Substituted

Entity or proposed Substituted Entity succeeds to Developer's Interest or within [60] days after the Substituted Entity has succeeded to Developer's Interest.

12.8.3 Any such certificate may be relied upon by, and only by, the Lender, proposed Lender, Substituted Entity or proposed Substituted Entity to whom the same may be delivered, and the contents of such certificate shall be binding on the Department.

12.9 Lenders as Third-Party Beneficiaries of the Provisions of Article 12

The Lenders are expressly recognized as being intended, direct third-party beneficiaries under the provisions of this Article 12 and may enforce any rights, remedies or claims conferred, given or granted thereunder.

ARTICLE 13. EQUITY TRANSFERS AND CHANGE OF CONTROL; COMMITTED INVESTMENT REQUIREMENT

13.1 Restrictions on Equity Transfers and Changes of Control of Developer

13.1.1 No Equity Transfers by or among Equity Members shall be allowed during the Term of this Agreement, except as provided in this Section 13.1.1 and Section 13.1.6.

13.1.1.1 No Equity Transfers by or among Equity Members are allowed from the Effective Date to the second anniversary of the Substantial Completion Date.

13.1.1.2 Two years following the Substantial Completion Date, Equity Transfers by or among Equity Members are allowed until [six] years from the Substantial Completion Date, provided that one or more of the initial Equity Members identified in Appendix 2-H collectively maintain more than [50]% of the equity interest in Developer.

13.1.1.3 After [six] years from the Substantial Completion Date, Equity Transfers by or among Equity Members are allowed.

13.1.1.4 If any Equity Transfer pursuant to Sections 13.1.1.2 or 13.1.1.3 would result in a Change of Control, such Equity Transfer shall be subject to the Department's prior reasonable approval in writing; and, if such Equity Transfer occurs prior to or without the Department's prior reasonable approval in writing, the Equity Transfer shall be deemed to be denied. The Department shall have the right to request information from Developer related to the potential Change of Control, including information to determine the impact on the technical capabilities and financial standing of Developer and Equity Members that may result from the Change of Control.

13.1.1.5 Notwithstanding the provisions in this Section 13.1.1, Equity Transfers by an Equity Member to its Affiliates falling under clauses (a) through (c) of the definition thereof are allowed after the Effective Date. For purposes of this Section 13.1 only, an Equity Member whose role (and role of its Affiliates involved in the Project, if any) is restricted solely to financial matters and who have no role in the performance of the Work, shall be deemed Affiliated to infrastructure funds managed by such Equity Member (or by one of its Affiliates).

13.1.2 No less than [90] days prior to the expected date of an Equity Transfer pursuant

to Section 13.1, Developer shall provide the Department information regarding the proposed Equity Transfer to enable the Department to evaluate whether the Equity Transfer is permitted, including: (a) the names of the transferor and transferee; (b) the three most recent audited financial statements of the transferee (if applicable); (c) the percentage of equity interest to be transferred; (d) the expected date of the Equity Transfer; (e) details of the Affiliate relationship between the transferor and the transferee (if applicable); (f) information demonstrating whether the Equity Transfer will result in a Change of Control; and (g) experience of the proposed equity transferee on similar projects as an investor, contractor or operator.

13.1.3 Provided that Developer furnished the Department the information required under Section 13.1.2, the Department shall provide written notice to Developer no later than [30] days before the expected date of the Equity Transfer if the Department concurs that such Equity Transfer is permitted under Section 13.1.1. If the proposed Equity Transfer would result in a Change of Control, the Department shall also provide written notice to Developer within such period if the Department approves of such Equity Transfer. If the Department fails to provide its concurrence or approval, as applicable, such Equity Transfer shall not be permitted, subject to Developer's right to submit a Dispute for resolution according to the Dispute Resolution Procedures.

13.1.4 Notwithstanding the foregoing, and provided that the conditions and limitations of Section 12.1 are fully satisfied, the exercise of a Lender's rights under the Security Documents to foreclose on the pledge of a shareholder, general partner or member's interest in Developer or otherwise acquire such interest by or through the exercise of a Lender's rights under the Security Documents that would otherwise result in a Change of Control shall not in and of itself constitute a Change of Control. However, any Person acquiring such interest shall be subject to the Department's prior reasonable approval in writing. Notwithstanding the foregoing, the acquisition of such interest by any entity that is wholly owned by a Lender or group of Lenders shall not require Department approval, provided that (a) the Department is furnished documentation proving that the entity is duly formed, validly existing and wholly owned by the Lender (including a certificate signed by an executive officer of each Lender in favor of the Department certifying, representing and warranting such ownership) and (b) the remaining Lenders have not exercised any rights to step in or to cure a Developer Default.

13.1.5 Any Equity Transfer or Change of Control in violation of this Section 13.1 shall be null and void *ab initio* and the Department, at its option, may declare any such attempted action to be a material Developer Default. The foregoing shall not prejudice Developer's right to cure a Developer Default under Section 18.1.2.1.

ARTICLE 14. FINANCIAL MODEL FOR THE PROJECT

14.1 Financial Model

14.1.1 Copies of the Original Financial Model and Financial Model are attached hereto as Appendix 2-B and Appendix 2-C, respectively.

14.1.2 In the event the Department is requested to disclose the Original Financial Model or Financial Model and Developer has identified the Original Financial Model or Financial Model as confidential material, the Department will promptly notify Developer so that Developer may seek a protective order or other appropriate remedy. If it wishes to protect the materials from disclosure, Developer shall seek court protection immediately on an emergency basis. In the

event that such protective order or other remedy is not timely sought or obtained by Developer, the Parties agree that the Department may and will release the Original Financial Model or Financial Model if the Department concludes that such disclosure is required by the Public Records Act.

14.2 Financial Model Updates

14.2.1 As agreed to from time to time by the Parties, the Financial Model may be updated to reflect changes in this Agreement. The Financial Model Update will become the Financial Model and will be attached to this Agreement by amendment.

14.2.2 Developer shall prepare the Financial Model Updates and shall provide the Department with [access to] each Financial Model Update and a complete set of the updated and revised assumptions, and other data that form a part of the Financial Model as updated, including updated and revised projections and calculations with respect to revenues, expenses, the payment of Project Debt and Distributions to Equity Members. The Department may require that the Financial Model Updates be audited by an independent audit firm satisfactory to the Department prior to Financial Model Update becoming effective under this Agreement. The Parties shall bear equally in the cost of the audit. The audit of the Financial Model Update may be the same one required by the Lenders.

14.2.3 The Department shall have the right at all times to gain access, on an Open Book Basis, to the Financial Model and each Financial Model Update and the set of updated and revised assumptions and other data that form part of each such model. The Department shall have the right to challenge the validity, accuracy or reasonableness of any Financial Model Update or the related updated and revised assumptions and data. In the event of a challenge, the immediately preceding Financial Model Update that has not been challenged (or, if there has been no unchallenged Financial Model Update, the Financial Model) shall remain in effect pending the outcome of the challenge or until a new Financial Model Update is issued and not challenged.

14.2.4 In no event shall the Financial Model Formulas be changed except with the prior written agreement of both Parties.

ARTICLE 15. PROJECT FINANCING AND REFINANCING

15.1 Developer Right and Responsibility to Finance Project

15.1.1 Developer is solely responsible for obtaining and paying for all financing, at its own cost and risk and without recourse to the Department, necessary for the acquisition, design, permitting, development, construction, equipping, operation, maintenance, modification, reconstruction, rehabilitation, restoration, renewal and replacement of the Project. Developer will diligently pursue its obligations to obtain the necessary financing as described in Appendix 8 to this Agreement (List of Initial Funding Agreements and Initial Security Documents).

15.1.2 Developer may grant security interests in or assign the entire Developer's Interest (but not less than the entire Developer's Interest) to Lenders for purposes of securing the Project Debt, subject to the terms and conditions contained in this Agreement and the Lease. Developer is strictly prohibited from pledging or encumbering the Developer's Interest, or any portion thereof, to secure any indebtedness of any Person other than (a) Developer, (b)

any special purpose entity that owns Developer but no other assets and has powers limited to Developer, the Project and Work, (c) a special purpose entity subsidiary owned by Developer or an entity described in clause (b) above, or (d) the PABs Issuer.

15.1.3 The Department will reasonably assist Developer in implementing those portions of its financial plan requiring issuance of debt by other Governmental Entities and in securing approvals from such Governmental Entities. Developer, however, is responsible for obtaining the necessary approval and implementation processes and for achieving Financial Close. The Department does not bear any risk for the failure of Developer to obtain funding from these potential sources, and such failure, if any, shall not diminish Developer's obligations under this Agreement except as specifically provided otherwise in Section 15.2.7.

15.1.4 If Developer seeks to utilize PABs or TIFIA Loans, then Developer bears all risks relating to a delay in receiving the necessary approvals and for compliance with all Federal Requirements. At Developer's written request, the Department will cooperate in good faith in order to assist Developer's efforts to obtain necessary federal approvals for PABs or TIFIA Loans.

15.1.5 Notwithstanding the foreclosure or other enforcement of any security interest created or perfected by a Financing Document, Developer shall remain liable to the Department for the payment of all sums owing to the Department under this Agreement and for the performance and observance of all of Developer's covenants and obligations under this Agreement.

15.2 Financing Competition and Financial Close

15.2.1 Concurrently with execution of this Agreement, Developer shall deliver, or has delivered, to the Department the Financial Close Security in the cumulative original amount of [\$____,000,000].

15.2.2 Developer may issue to the Department, at any time between 240 and 150 days before the date the Department estimates it will achieve Phase 1 Substantial Completion, a written notice that Developer is commencing a competition among eligible Lenders for providing the Initial Project Debt (the "**Financing Commencement Notice**"). Department shall cooperate with Developer to keep Developer informed of Department's estimate of such date. If for any reason Developer has not issued the Financing Commitment Notice by 150 days before the date the Department estimates it will achieve Phase 1 Substantial Completion, then the Department thereafter shall have the right to issue the Financing Commitment Notice to Developer, authorizing and directing Developer to commence a competition among eligible Lenders for providing the Initial Project Debt.

15.2.3 Commencing upon issuance of the Financing Commitment Notice, Developer shall conduct a competition among eligible Lenders to provide the Initial Project Debt. Developer shall conduct such competition in compliance with the provisions of Appendix 13.

15.2.4 Unless Developer or the Department elects to terminate this Agreement pursuant to Section 19.2.1, Developer shall be unconditionally obligated to enter into the Initial Funding Agreements and Initial Security Documents and complete closing for all the Initial Project Debt (including any sub-debt), in a total amount which, when combined with all unconditional equity commitments acceptable to the Collateral Agent, is sufficient to fund all capital requirements set forth in the Original Financial Model, by not later than the Financial Close Deadline.

15.2.5 Except to the extent expressly permitted in writing by the Department, Developer shall not be deemed to have achieved Financial Close until all of the following conditions have been satisfied:

15.2.5.1 Developer has completed the financing competition in accordance with the terms and conditions therefor set forth in Appendix 13;

15.2.5.2 Developer has delivered to the Department for review and comment drafts of those proposed Initial Funding Agreements and Initial Security Documents that will contain the material commercial terms relating to the Initial Project Debt not later than [14] days prior to the proposed date for Financial Close, and such Initial Funding Agreements and Initial Security Documents are consistent with, or no less favorable to Developer than, the terms and conditions offered by the Lenders selected pursuant to the financing competition;

15.2.5.3 The Department has received an update of the audit and opinion obtained from the independent model auditor that provided to the Department an opinion on suitability of the Original Financial Model, which update shall (a) be co-addressed to the Department, (b) expressly identify the Department as an entity entitled to rely thereon, (and (c) take into account only the differences between the financial terms assumed in the Original Financial Model and the financial terms obtained through the financing competition, and (d) be delivered within two Business Days after the date of Financial Close;

15.2.5.4 Developer has delivered to the Department a true and complete executed copy of each Direct Agreement requested by the Lenders, if any;

15.2.5.5 All applicable parties have entered into and delivered the Initial Funding Agreements and Initial Security Documents (except to the extent that such documents are not required to be executed on such date) meeting the requirements of Section 15.4, and Developer has delivered to the Department true and complete copies of the executed Initial Funding Agreements and Initial Security Documents (other than minor ancillary documents normally delivered after Financial Close and containing no new material commercial terms); and

15.2.6 Developer shall provide the Department with written notice of Developer's satisfaction of the conditions set forth in Section 15.2.5 within one Business Day after all such conditions are satisfied.

15.2.7 Developer's obligation to achieve Financial Close by the Financial Close Deadline is excused only if such failure is directly attributable to any of the following (and in such event this Agreement may be terminated pursuant to Section 19.2.1):

15.2.7.1 If PABs are part of the initial financing under Developer's Financial Plan and as a result of the financing competition, any delay in identifying the PABs Issuer or any delay by or refusal of the PABs Issuer to issue bonds in the amount that Developer's underwriters selected as a result of the financing competition are prepared to underwrite, provided that such refusal or delay is not due to any fault or less than diligent efforts and cooperation of Developer. If Developer's financing schedule does not include normal and customary time periods for carrying out the ordinary and necessary functions of a conduit issuer of tax-exempt bonds, failure of the PABs Issuer to meet that schedule shall not be considered a delay;

15.2.7.2 If PABs are part of the initial financing under Developer's Financial Plan and as a result of the financing competition, (a) the refusal of the PABs Issuer's counsel to authorize closing of the PABs where the bond counsel is ready to give an unqualified opinion regarding the validity of the issuance of the PABs and the tax exempt status of interest paid on the PABs, unless the basis for such refusal is that it would be unreasonable for bond counsel to deliver the opinion or (b) the delay of the PABs Issuer's counsel in authorizing closing of the PABs. If the Developer's financing schedule does not include normal and customary time periods for carrying out the ordinary and necessary functions of such counsel to a conduit issuer of tax-exempt bonds, failure of the PABs Issuer's counsel to meet that schedule shall not be considered a delay;

15.2.7.3 If PABs are part of the initial financing under Developer's Financial Plan and as a result of the financing competition, the withdrawal, rescission or revocation of the PABS allocation by the USDOT Secretary in the amount approved by the USDOT Secretary where such failure directly causes inability to achieve Financial Close by the Financial Close Deadline;

15.2.7.4 If TIFIA credit assistance is part of the initial financing under Developer's Financial Plan and as a result of the financing competition, the failure of the TIFIA Joint Program Office to close financing or provide financing on or prior to the Financial Close Deadline despite commercially reasonable best efforts by Developer to do so (including making reasonable financial and commercial concessions as necessary and appropriate under the circumstances); provided, however, that the foregoing protection shall not apply if (a) Developer's Financial Plan was materially different from the plan recommended by the TIFIA Credit Council and approved by USDOT prior to the Proposal Due Date, (b) Developer's TIFIA-related terms and conditions contain material deviations from the terms set forth in any conditional term sheet and/or conditional credit agreement for the Project provided to the Department by the TIFIA Joint Program Office, (c) the failure of Developer, prior to the expiration date set by the TIFIA Joint Program Office, to satisfy any of the conditions precedent for TIFIA financing set forth in any conditional term sheet and/or conditional credit agreement for the Project provided to the Department by the TIFIA Joint Program Office, or (d) Developer's TIFIA-related terms and conditions are inconsistent with the laws and regulations applicable to TIFIA; or

15.2.7.5 The issuance of a temporary restraining order or other form of injunction by a court with jurisdiction that prohibits prosecution of any material portion of the Work, where the order or injunction remains pending on the Financial Close Deadline.

15.2.8 Provided that Developer completes the financing competition in accordance with Appendix 13, the Department will bear the risk and have the benefit of differences in the weighted average cost of capital (either positive or negative) between that obtained at Financial Close as a result of the financial competition and that assumed in the Original Financial Model. The Maximum Availability Payment shall be adjusted prior to Financial Close as set forth in Appendix 24 to this Agreement on account of such difference.

15.2.9 The Parties shall update Appendix 8 at Financial Close.

15.2.10 Within two Business Days after the date of Financial Close, the Department shall return to Developer the original of the Financial Close Security.

15.2.11 Developer shall deliver copies of any ancillary supporting documents

(e.g., UCC filing statements) to the Department within 30 days after the date of Financial Close.

15.3 No Department Liability for Project Debt

15.3.1 All Project Debt or other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project shall be issued or incurred only in the name of Developer, a Developer-Related Entity or the PABs Issuer. The Department shall have no obligation to pay debt service on any debt issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer. The Department shall have no obligation to join in, execute or guarantee any note or other evidence of indebtedness of Developer, a Developer-Related Entity or the PABs Issuer, any other Funding Agreement or any Security Document.

15.3.2 None of the State, the Department, or any other agency, instrumentality or political subdivision of the State, and no board member, director, officer, employee, agent or representative of any of them, has any liability whatsoever for payment of the principal sum of any Project Debt, any other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project, or any interest accrued thereon or any other sum secured by or accruing under any Funding Agreement or Security Document. Except for a violation by the Department of its express obligations to Lenders set forth in Article 12 and the Direct Agreement, no Lender is entitled to seek any damages or other amounts from the Department, whether for Project Debt or any other amount. The Department's review of any Financing Documents or other Project financing documents is not a guarantee or endorsement of the Project Debt, any other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement, the Lease or the Project, or any traffic and revenue study, and is not a representation, warranty or other assurance as to the ability of Developer, a Developer-Related Entity or the PABs Issuer to perform its obligations with respect to the Project Debt or any other obligations issued or incurred by Developer, a Developer-Related Entity or the PABs Issuer in connection with this Agreement or the Project, or as to the adequacy of the Milestone Payments or Availability Payments to provide for payment of the Project Debt or any other obligations issued or incurred by Developer in connection with this Agreement or the Project. The foregoing does not affect the Department's liability to Developer or a Developer-Related Entity under Article 19 for Termination Compensation that is measured in whole or in part by outstanding Project Debt.

15.4 Mandatory Terms of Project Debt, Funding Agreements and Security Documents

Project Debt and Financing Documents, including the Initial Project Debt and Initial Financing Documents (as listed in Appendix 8 to this Agreement) and any amendments or supplements thereto, shall be subject to the Department's prior written approval and shall comply with the following terms and conditions:

15.4.1 The Security Document may only secure Project Debt the proceeds of which are used exclusively for the purpose of (a) either acquiring, designing, permitting, building, constructing, improving, equipping, modifying, operating, maintaining, reconstructing, restoring, rehabilitating, renewing or replacing the Project, (b) making Distributions, but only from the proceeds of refinancings permitted under this Agreement, (c) Rescue Refinancing, including making protective advances intended to prevent or remedy a default under this Agreement or a Funding Agreement or both, (d) refinancing any Project Debt under subsections (a), (b), or (c) above, including paying the reasonable costs of closing the Refinancing (including Lender fees, advisor fees and the fees of legal counsel), (e) to fund reserves relating to the Project, and (f)

paying closing costs with respect to Project Debt, financing costs and fees, and interest costs;

15.4.2 The Security Document may only secure Project Debt and Funding Agreements issued and executed by (a) Developer or a Developer-Related Entity, (b) its permitted successors and assigns, (c) a special purpose entity that owns Developer but no other material assets and has purposes and powers limited to the Project and the Work, (d) any special purpose subsidiary wholly owned by such entity, or (e) the PABs Issuer;

15.4.3 The Security Documents as a whole securing each separate issuance of debt shall encumber the entire Developer's Interest, provided that the foregoing does not preclude subordinate Security Documents or equipment lease financing;

15.4.4 No Security Document or other instrument purporting to mortgage, pledge, encumber, or create a lien, charge or security interest on or against Developer's Interest shall extend to or affect the fee simple interest of the Department in the Project or the fee simple interest of the Department in the Project Right of Way or the Department's rights or interests under the Contract Documents;

15.4.5 Any number of permitted Financing Documents may be outstanding at any one time, and any Security Document permitted hereunder may secure two or more separate loans from two or more separate Lenders, provided that each such loan and the Security Documents securing the same comply with the provisions of this Article 15;

15.4.6 Each note, bond or other negotiable or non-negotiable instrument evidencing Project Debt, or evidencing any other obligations issued or incurred by any Person described in Section 15.4.2 in connection with this Agreement, the Lease or the Project must include or refer to a document controlling or relating to the foregoing that includes a conspicuous recital to the effect that payment of the principal thereof and interest thereon is a valid claim only as against the obligor and the security pledged by Developer or the obligor therefor, is not an obligation, moral or otherwise, of the State, the Department, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them, and neither the full faith and credit nor the taxing power of the State, the Department, or any other agency, instrumentality or political subdivision of the State is pledged to the payment of the principal thereof and interest thereon;

15.4.7 Each Funding Agreement and Security Document shall expressly state, or incorporate a statement by reference to another Funding Agreement or Security Document that expressly states, that the Lender shall not name or join the State, the Department, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them in any legal proceeding seeking collection of the Project Debt or other obligations secured thereby or the foreclosure or other enforcement of the Funding Agreement or Security Document;

15.4.8 Each Funding Agreement and Security Document shall expressly state, or incorporate a statement by reference to another Funding Agreement or Security Document that expressly states, that the Lender shall not seek any damages or other amounts from the State, the Department, any other agency, instrumentality or political subdivision of the State, or any elected official, board member, director, officer, employee, agent or representative of any of them, whether for Project Debt or any other amount, except (a) damages from the Department for a violation by the Department of its express obligations to Lenders set forth in Article 12 or in the Direct Agreement and (b) amounts due from the Department under this Agreement where

the Lender has succeeded to the Developer's Interest, whether by way of foreclosure, transfer in lieu of foreclosure or subrogation;

15.4.9 Each Funding Agreement and Security Document shall require that the Collateral Agent deliver to the Department, concurrently with delivery to Developer or any other Person, every notice of default, election to sell, notice of sale or other notice required by Law or by the Funding Agreement or Security Document in connection with the exercise of remedies under the Funding Agreement or Security Document;

15.4.10 No Financing Documents shall grant to the Lender any right to apply funds in the Renewal Work Reserve, Handback Requirements Reserve Account, or to apply proceeds from any Renewal Work Letter of Credit or Handback Requirements Letter of Credit, to the repayment of Project Debt, to any other obligation owing the Lender or to any other use except the respective uses set forth in Sections 5.7.3 and 5.10.3, and any provision purporting to grant such right shall be null and void; provided, however, that the foregoing shall not preclude any Lender or Substituted Entity from, following foreclosure or transfer in lieu of foreclosure, automatically succeeding to all rights, claims and interests of Developer in and to the Renewal Work Reserve and Handback Requirements Reserve Account. No Financing Document shall purport to grant to the Lender a lien or security interest in the Handback Requirements Reserve Account superior in priority to the Department's lien and security interest described in Section 5.10.1.1;

15.4.11 Each relevant Funding Agreement and Security Document that may be in effect during any part of the period that the Renewal Work Reserve or Handback Requirements Reserve Account applies shall expressly permit, without condition or qualification, or incorporate permission by reference to another Funding Agreement or Security Document that expressly permits, without condition or qualification, Developer to (a) use and apply funds in the Renewal Work Reserve and Handback Requirements Reserve Account in the manner contemplated by the Contract Documents and (b) otherwise comply with its obligations in the Contract Documents regarding Renewal Work, the Renewal Work Schedule, Renewal Work Reserve, Handback Requirements and the Handback Requirements Reserve Account. Subject to the foregoing, any protocols, procedures, limitations and conditions concerning draws from the Renewal Work Reserve or Handback Requirements Reserve Account set forth in any Funding Agreement or Security Document shall be consistent with the permitted uses of the Renewal Work Reserve and Handback Requirements Reserve Account, and shall not constrain Developer's or the Department's access thereto for such permitted uses, even during the pendency of a default under the Funding Agreement or Security Document;

15.4.12 Each Funding Agreement and Security Document shall expressly state, or incorporate a statement by reference to another Funding Agreement or Security Document that expressly states, that the Lender and the Collateral Agent shall respond to any request from the Department or Developer for consent to a modification or amendment of this Agreement within a reasonable period of time;

15.4.13 Each Funding Agreement and Security Document shall expressly state, or incorporate a statement by reference to another Funding Agreement or Security Document that expressly states, that the Lender agrees to exclusive jurisdiction and venue in the federal and State courts in the City and County of San Francisco in any action by or against the Department or its successors and assigns; and

15.4.14 No Financing Document shall contain terms that are inconsistent with the

terms of the Contract Documents.

15.5 Refinancing

15.5.1 Right of Refinancing

With the prior consent of the Department in writing by the Department's Authorized Representative, which consent shall not be unreasonably delayed or withheld, Developer from time to time may consummate Refinancings under the Funding Agreements on terms and conditions acceptable to Developer and in compliance with Sections 15.5.2 and 15.5.3; provided that the Department's consent shall not be required for an Exempt Refinancing or a Rescue Refinancing so long as Developer shall: (a) notify the Department at least [30] days in advance of such Exempt Refinancing or Rescue Refinancing and (b) include in such notice facts to support the basis on which Developer believes the Refinancing constitutes an Exempt Refinancing or a Rescue Refinancing. The Department's approval of a Refinancing shall be based on confirming compliance with Sections 15.5.2 and 15.5.3 and agreement on the amount, if any, of Refinancing Gain payable to the Department upon the closing of the Refinancing. The Department shall have no obligations or liabilities in connection with any Refinancing except to deliver estoppel certificates pursuant to Section 12.8 and to allow for the new Lender to be added to the Direct Agreement.

15.5.2 Notice, Consent and Documentation of Refinancing

15.5.2.1 In connection with any proposed Refinancing, except a Refinancing that is exempt from approval as provided in Section 15.5.1, Developer shall as soon as practicable submit to the Department a summary outline of the proposed Refinancing, together with a schedule setting forth the various activities, each with schedule durations, to be accomplished from the commencement through the close of the proposed Refinancing. At least [35] days prior to the proposed date for closing the Refinancing, Developer shall submit to the Department draft proposed Financing Documents, and all other relevant background information regarding the proposed Refinancing, including the proposed term sheet and the financial model showing how Developer has calculated the Refinancing Gain, if any, following the procedures set forth in Appendix 12 (Calculation and Payment of Refinancing Gain), and any other matters required by Appendix 12. The Department shall have up to [20] days to review and determine whether the proposed Refinancing (a) will result in a Refinancing Gain and (b) is an Exempt Refinancing, and, if applicable, select the means for payment of its portion of the Refinancing Gain. If the Department approves the draft proposed Financing Documents for further processing, Developer shall submit final drafts of these documents, including updated versions of the background information previously submitted to the Department, for final review and approval not later than [ten] days prior to the proposed date for closing the Refinancing. Developer shall only proceed with the Refinancing upon receipt of prior written consent from the Department, which will be provided no later than [5] days after receiving the final documents. If Developer proceeds with the Refinancing, it shall deliver to the Department copies of all signed Financing Documents in connection with the Refinancing as well as a final calculation of the Refinancing Gain not later than [ten] days after close of the Refinancing, together with a revised Financial Model reflecting the final terms of the Refinancing and showing Developer's final calculation of the Refinancing Gain. No later than [15] days after close of the Refinancing, the Department and Developer shall meet and confer to agree upon the final calculation of the Refinancing Gain, at which time Developer shall pay the Department its portion of the Refinancing Gain if the selected means of payment is a lump sum payment.

15.5.2.2 With respect to a Rescue Refinancing, at least [30] days prior to the proposed date for closing the Refinancing, Developer shall submit to the Department the proposed term sheet, the financial model and the other documents required by Appendix 12 (Calculation and Payment of Refinancing Gain) showing how Developer has calculated the Refinancing Gain following the procedures set forth in Appendix 12 or demonstrating that the Rescue Refinancing will not produce Refinancing Gain. The Department will have up to [20] days to review and dispute Developer's calculation of Refinancing Gain, provide comments and determine whether such calculations have been made in accordance with the requirements of Appendix 12.

15.5.3 Refinancing Gain

15.5.3.1 The Department shall be entitled to receive a payment equal to [50]% of any Refinancing Gain attributable to any Refinancing other than an Exempt Refinancing. The Department shall receive its portion of the Refinancing Gain in the manner provided in Appendix 12.

15.5.3.2 The Refinancing Gain shall be calculated in accordance with Appendix 12. The Parties shall negotiate in good faith to determine the Refinancing Gain; and if the Parties fail to agree, the Dispute shall be resolved according to the Dispute Resolution Procedures.

15.5.4 Refinancing Limitations, Requirements and Conditions

Proposed Refinancings are subject to the following limitations, requirements and conditions precedent:

15.5.4.1 Other than an Exempt Refinancing and a Rescue Refinancing, no Refinancing is permitted prior to the Substantial Completion Date, except to the extent Developer demonstrates to the Department's reasonable satisfaction that (a) the Committed Investment will continue to meet or exceed the minimum amount described in Section 13.2.1, and (b) the Refinancing will produce Refinancing Gain in which the Department will be entitled to a portion in accordance with Section 15.5.3.

15.5.4.2 If the Department renders any assistance or performs any requested activity in connection with a Refinancing apart from delivering an estoppel certificate, then concurrently with, and as a condition precedent to Developer's right to close a Refinancing, Developer shall reimburse the Department all Department's Recoverable Costs that the Department incurs in connection therewith. The Department shall deliver to Developer a written invoice and demand therefor prior to the scheduled date of closing. If for any reason the Refinancing does not close, Developer shall reimburse such Department's Recoverable Costs and such other fees, costs and expenses within [ten] days after the Department delivers to Developer a written invoice and demand therefor.

15.5.4.3 Developer shall bear all risks for any Refinancing that negatively affects its Equity IRR, debt coverage ratios or financial performance.

ARTICLE 16. INSURANCE, PAYMENT AND PERFORMANCE SECURITY, AND INDEMNITY

16.1 Insurance

16.1.1 Insurance Policies and Coverage

Developer shall procure and maintain, or cause to be procured or maintained, the Insurance Policies identified in this Section 16.1 and in Appendix 9 strictly in accordance with the minimum coverage requirements and terms of coverage as set forth in Appendix 9 and in this Section 16.1. Such Insurance Policies shall cover (a) the described exposures not covered by the OCIP, (b) the described exposures with respect to OCIP-excluded Contractors performing Work during the period up to Final Acceptance, (c) the described exposures with respect to Work performed off the OCIP Site during the period up to Final Acceptance, (d) the described exposures with respect to O&M Work performed during the period up to Final Acceptance, and (e) the described exposures with respect to all Work performed after Final Acceptance.

16.1.2 General Insurance Requirements

16.1.2.1 Insurers

All Insurance Policies shall be procured from insurers that at the time coverage commences are licensed to do business in the State and have a current policyholder's management and financial size category rating of not less than "A- VI" according to A.M. Best's Financial Strength Rating and Financial Size Category, except as otherwise provided in Appendix 9 or approved in writing by the Department in its good faith discretion.

16.1.2.2 Deductibles and Self-Insured Retentions

1. If the OCIP provides coverage with respect to an occurrence or event, then Section 16.1.6.12 shall govern Developer's and its covered Contractors' responsibility for paying deductibles.
2. If an Insurance Policy provides coverage with respect to a Relief Event, Developer's deductible liability shall be governed by whichever of the Non-Discriminatory O&M Change Deductible, Pre-existing Hazardous Materials Deductible, Tiered Pre-existing Hazardous Materials Deductible, Seismic Event Deductible or Claim Deductible is applicable (if any), subject to Section 9.1.5.
3. If an Insurance Policy provides coverage with respect to an occurrence or event other than a Relief Event, then Developer or its Contractor, as the case may be, shall be responsible for paying all insurance deductibles, and the Department shall have no liability for deductibles, and claim amounts in excess of the required coverage.
4. No self-insured retentions are permitted with respect to any risk or occurrence required by this Agreement to be covered by an Insurance Policy.
5. The Department will have the right to recover deductibles and claim amounts in excess of the required coverage through deductions from Milestone

Payments or Availability Payments, direct billing, or any other method deemed appropriate by the Department.

16.1.2.3 Primary Coverage

Each policy shall provide that the coverage thereof is primary and noncontributory with respect to all named and additional insureds. For each property policy, such policy shall provide that the coverage thereof is primary and noncontributory with respect to all insureds, as their interest may appear. Any insurance or self-insurance beyond that specified in this Agreement that is maintained by an insured or any such additional insured shall be excess of such insurance and shall not contribute with it.

16.1.2.4 Verification of Coverage

1. At each time Developer is required to initially obtain or cause to be obtained each Insurance Policy, and thereafter not less than five Business Days prior to the expiration date of each Insurance Policy, Developer shall deliver to the Department a written binder of insurance, provided that if common commercial practice in the insurance industry calls for a shorter period prior to renewal for issuance of the insurance binder documenting such renewal, then such shorter period shall apply. The binder of insurance shall be on a standard form reasonable acceptable to the Department. Each required binder must be personally and manually signed by a representative or agent of the insurance company shown on the binder with a statement that he/she is an authorized representative or agent of such insurance company and is authorized to bind it to the coverage, limits and termination provisions shown on the binder. Each binder must be accompanied with proof that the person signing the binder is an authorized representative or agent of such insurance company. Each binder must be original, state the signer's company affiliation, title and phone number, state the identity of all Insurers, named insureds and additional insureds, state the type and limits of coverage, deductibles, subrogation waiver, termination provisions of the policy and other essential policy terms, list and describe all endorsements, include as attachments all additional insured endorsements, and include a statement, if commercially available, that coverage may not be cancelled by the insurer for any reason except for non-payment of premium, fraud, or repeated failure of the named insured to implement reasonable loss control measures.
2. In addition, as soon as they become available, Developer shall deliver to the Department (a) a true and complete copy of each such Insurance Policy or modification, or renewal or replacement Insurance Policy and all endorsements thereto and (b) satisfactory evidence of payment of the premium therefor.
3. If Developer has not provided the Department with the foregoing proof of coverage and payment within three Business Days after receipt of written request therefor, the Department may, upon two Business Days written notice to Developer, in addition to any other available remedy, without obligation and without further inquiry as to whether such insurance is actually in force, obtain such an Insurance Policy; and Developer shall reimburse the Department for the cost thereof upon demand.

16.1.2.5 Contractor Insurance Requirements

1. Developer shall cause each Contractor to provide Insurance Policies that comply with the terms and limits described in Appendix 9 and this Section 16.1 in circumstances where the Contractor is not covered by the OCIP or Developer-provided insurance. Developer shall cause each such Contractor to include the additional insureds specified in the applicable Insurance Policies as required under Appendix 9. Developer shall cause each such Contractor to require that its insurer agree to waive any subrogation rights the insurers may have against such additional insureds or consent to each insured's waiver of recovery in advance of loss. If requested by the Department, Developer shall promptly provide certificates of insurance evidencing coverage for each Contractor.
2. A consolidated, Developer-managed, insurance program is acceptable to satisfy all insurance requirements outside the OCIP, provided that it otherwise meets the requirements described in Appendix 9 and this Section 16.1.

16.1.2.6 Project-Specific Insurance

Except for professional liability Insurance Policies, all Insurance Policies shall be purchased specifically and exclusively for the Project and extend to all aspects of the Work, with coverage limits devoted solely to the Project. Insurance coverages with dedicated Project-specific limits and identified premiums are acceptable, provided that they otherwise meet all requirements described in Appendix 9 and this Section 16.1.

16.1.2.7 Endorsements and Waivers

All Insurance Policies shall contain or be endorsed to comply with all requirements specified in the Contract Documents, as well as the following provisions, provided that, for the workers' compensation and professional liability policies, only subsections (3) and (7) below shall be applicable:

1. Any failure on the part of a named insured to comply with reporting provisions or other conditions of the policies, any breach of warranty, any action or inaction of a named insured or others, or any change in ownership of all or any portion of the Project or Developer's Interest shall not vitiate coverage provided to the other named insureds or additional insureds (and their respective members, directors, officers, employees, agents and Project consultants);
2. The insurance shall apply separately to each named insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability;
3. Each policy shall be endorsed to state that coverage cannot be canceled, voided, suspended, lapsed, modified or reduced in coverage or in limits except after 60 days' (or for non-payment of premium, fraud, or repeated failure of the named insured to implement reasonable loss control measures, ten days') prior written notice by registered or certified mail, return receipt

requested, has been given to the Department. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice;

4. Endorsements adding additional insureds to required Insurance Policies shall contain no limitations, conditions, restrictions or exceptions to coverage beyond those that apply under the policy generally, and shall state that the interests and protections of each additional insured shall not be affected by any misrepresentation, act or omission of a named insured or any breach by a named insured of any provision in the policy which would otherwise result in forfeiture or reduction of coverage. The commercial general liability policy shall contain an endorsement providing additional insureds with coverage for "completed operations;"
5. The commercial general liability Insurance Policy shall cover liability arising out of the acts or omissions of Developer's employees engaged in the Work and employees of Contractors to the extent Contractors are provided coverage under such liability policy;
6. The automobile liability Insurance Policy shall be endorsed as required to include Motor Carrier Act Endorsement-Hazardous Materials Clean up (MCS-90) for those Contractors who will at any time transport Hazardous Materials; and
7. Unless specified otherwise in Appendix 9, each Insurance Policy shall provide coverage on an "occurrence" basis and not a "claims made" basis.

16.1.2.8 Waivers of Subrogation

The Department and Developer waive all rights against each other, against each of their agents, employees and Project consultants, against Contractors and their respective members, directors, officers, employees, subcontractors and agents, and against the OCIP Administrator, for any claims to the extent covered and paid by insurance obtained pursuant to this Section 16.1, except such rights as they may have to the proceeds of such insurance. If Developer is deemed to self-insure a claim or loss under Section 16.1.4.3, then Developer's waiver shall apply as if it carried the required insurance. Developer shall require all Contractors to provide similar waivers in writing each in favor of all other parties specified above. Each policy which Developer is required to provide or cause a Contractor to provide hereunder shall include a waiver of any right of subrogation against the Department and its agents and Project consultants (and their respective members, directors, officers and employees) and against the OCIP Administrator or a consent to each insured's waiver of recovery in advance of loss.

16.1.2.9 No Recourse

Except as may be inclusive within the MAP or as expressly provided otherwise in this Section 16.1, there shall be no recourse against the Department for payment of premiums or other amounts with respect to the Insurance Policies.

16.1.2.10 Support of Indemnifications

The insurance coverage Developer is required to provide hereunder, as well as the

OCIP, shall support but are not intended to, and shall not, limit Developer's indemnification and defense obligations under the Contract Documents.

16.1.2.11 Adjustments in Coverage Amounts

1. At least once every two years during the Term (commencing initially on the Substantial Completion Date), the Department and Developer shall review and increase, as appropriate, the per occurrence and aggregate limits for the Insurance Policies (other than the OCIP) that have stated dollar amounts set forth in Appendix 9. At the same frequency the Department and Developer shall review and adjust, as appropriate, the deductibles for such Insurance Policies.
2. In determining increases and adjustments, Developer and the Department shall take into account (a) claims and loss experience for the Project, provided that premium increases due to adverse claims experience shall not be a basis for justifying increased deductibles, (b) the condition of the Project, (c) the Safety Compliance and Noncompliance Points record for the Project, and (d) then prevailing Best Management Practice for insuring comparable transportation projects.
3. Any Dispute regarding increases in insurance limits or adjustments to deductibles shall be resolved according to the Dispute Resolution Procedures.

16.1.2.12 Inadequacy and Unavailability of Required Coverages

1. The Department makes no representation that the scope of coverage and limits of liability specified in the OCIP or for any Insurance Policy to be carried pursuant to this Agreement or approved variances therefrom are adequate to protect Developer against its undertakings under this Agreement to the Department, or its liabilities to any third party. The coverage, as with all insurance, is limited in scope and amount and may not include every form of insurance protection Developer or its Contractor may deem necessary. It is the responsibility of Developer and each Contractor to discuss the OCIP and other Insurance Policies with their insurance agents, brokers or consultants, and verify if any changes or additional coverages are required. No such limits of scope or liability or approved variances therefrom shall preclude the Department from taking any actions as are available to it under the Contract Documents, or otherwise at Law.
2. If Developer demonstrates to the Department's reasonable satisfaction that it has used diligent efforts in the global insurance and reinsurance markets to procure the Insurance Policy coverages, and if despite such diligent efforts and through no fault of Developer any of such coverages (or any of the required terms of such coverages, including policy limits) become completely unavailable or unavailable at commercially reasonable rates from insurers meeting the financial requirements set forth in Section 16.1.2.1, the Department will consider in good faith alternative insurance packages and programs that provide coverage as comparable to that contemplated in this Section 16.1 as is possible under then-existing insurance market conditions.

For purposes of this Section 16.1.2.12, commercially reasonable rates are rates equal to or less than [200]% of the benchmark for the Insurance Policy at issue as described in Section 16.1.2.13. The Department will be entitled to a credit for any insurance premium savings resulting from the modification or elimination of the insurance requirements, and the Department will act as the insurer of last resort to cover the unavailable Insurance Policy or portion thereof. In the alternative and at the Department's sole option exercisable by delivering to Developer a written notice of termination, the Department may terminate this Agreement if any insurance coverage required under this Agreement, including under the OCIP, becomes completely unavailable or unavailable at commercially reasonable rates from insurers meeting the financial requirements set forth in Section 16.1.2.1, with the Termination Compensation owed to Developer being calculated pursuant to Section 19.3.6. If the required insurance coverage is available in the market, the Department's decision to approve or disapprove a variance from the requirements of this Section 16.1 shall be final and not subject to the Dispute Resolution Procedures.

16.1.2.13 Insurance Premium Benchmarking

Except as otherwise provided in Appendix 9, Developer shall bear the full risk of any insurance premium increases from the Effective Date until NTP 2, and shall not be entitled to any claim for relief for such increases. The Department and Developer shall allocate the risk of significant increases in insurance premiums through an insurance benchmarking process as set forth in Appendix 9.

16.1.2.14 Defense Costs

Unless otherwise approved in writing by the Department in its good faith discretion, no defense costs shall be included within or erode the limits of coverage of any of the Insurance Policies, except that defense costs may be included within the limits of coverage of professional liability and pollution liability policies.

16.1.2.15 Contesting Denial of Coverage

If any Insurer under an Insurance Policy described in Sections 16.1.1 and 16.1.3 denies coverage with respect to any claims reported to such Insurer, Developer and the Department shall cooperate in good faith to establish whether and to what extent to contest, and how to fund the cost of contesting, the denial of coverage; provided that if the reported claim is a matter covered by an indemnity in favor of the Department or the denial is the result of Developer's failure to comply with an insurance requirement, then Developer shall bear all costs of contesting the denial of coverage.

16.1.3 Lender Insurance Requirements; Additional Insurance Policies

1. If under the terms of any Funding Agreement or Security Document Developer is obligated to, and does, carry insurance coverage with higher limits, lower deductibles, or broader coverage than required under this Agreement, Developer's provision of such insurance shall satisfy the applicable requirements of this Agreement provided such policy meets all the other applicable requirements of this Section 16.1.

2. If Developer carries insurance coverage respecting the Project or Work in addition to that required under this Agreement, then Developer shall include the Department and its respective members, directors, officers, employees, agents and Project consultants as additional insureds thereunder, under additional insured endorsements as described in Section 16.1.2.7.4, and shall provide to the Department the proofs of coverage and copy of the policy described in Section 16.1.2.4. If, however, Developer demonstrates to the Department that inclusion of such Persons as additional insureds will increase the premium, the Department shall elect either to pay the increase in premium or forego additional insured status. The provisions of Sections 16.1.2.4, 16.1.2.7, 16.1.2.8, 16.1.2.9, 16.1.2.15 and 16.1.4 shall apply to all such policies of insurance coverage, as if they were within the definition of Insurance Policies.

16.1.4 Notice and Prosecution of Claims

16.1.4.1 The Department shall have the right, but not the obligation, to report directly to insurers and process the Department's claims against applicable Insurance Policies. Unless otherwise directed by the Department in writing with respect to the Department's insurance claims, Developer shall be responsible for reporting and processing all potential claims by the Department or Developer against the Insurance Policies. Developer agrees to report timely to the insurer(s) under such policies any and all matters which may give rise to an insurance claim by Developer or the Department and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such policies, whether for defense or indemnity or both. Developer shall enforce all legal rights against the insurer under the applicable Insurance Policies and applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments, provided that Developer shall be deemed to have satisfied this obligation if a judgment is not collectible through the exercise of lawful and diligent means.

16.1.4.2 Developer shall immediately notify the Department, and thereafter keep the Department fully informed, of any incident, potential claim, claim or other matter of which Developer becomes aware that involves or could conceivably involve an Indemnified party as a defendant.

16.1.4.3 The Department agrees to promptly notify Developer of the Department's incidents, potential claims against the Department, and matters of which the Department is aware which may give rise to a Department insurance claim or to a right of defense and indemnification under Section 16.4. Delivery of any such notice will constitute a tender of the Department's defense of the claim to Developer and the insurer under any applicable Insurance Policies, subject to the Department's rights to control its own defense to the extent provided in Section 16.5 or by applicable Law. The Department shall cooperate with Developer as necessary for Developer to fulfill its duties hereunder, including providing Developer a copy of all written materials the Department receives asserting a claim against the Department that is subject to defense by an insurer under an Insurance Policy or by Developer under Section 16.5.

16.1.4.4 If in any instance Developer has not performed its obligations respecting insurance coverage set forth in this Agreement or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the Insurance Policies or to prosecute claims diligently, then for purposes of determining Developer's liability

and the limits thereon or determining reductions in compensation due from the Department to Developer on account of available insurance, Developer shall be treated as if it has elected to self-insure up to the full amount of insurance coverage which would have been available had Developer performed such obligations or not committed such failure. Nothing in this Section 16.1.4 or elsewhere in this Section 16.1 shall be construed to treat Developer as electing to self-insure where Developer is unable to collect due to the bankruptcy or insolvency of any insurer which at the time the Insurance Policy is written meets the rating qualifications set forth in this Section 16.1.

16.1.4.5 In the event that an Insurer providing any of the Insurance Policies becomes the subject of bankruptcy proceedings, becomes insolvent, or is the subject of an order or directive limiting its business activities given by any Governmental Entity, including the State Department of Insurance, Developer shall exercise best efforts to promptly and at its own cost and expense secure alternative coverage in compliance with the insurance requirements contained in this Section 16.1 so as to avoid any lapse in insurance coverage.

16.1.5 Application of Insurance Proceeds

All insurance proceeds received for physical property damage to the Project under any Insurance Policies, other than any business interruption insurance maintained as part of such Insurance Policies, shall be first applied to repair, reconstruct, rehabilitate, restore, renew, reinstate and replace each part or parts of the Project in respect of which such proceeds were received.

16.1.6 Owner-Controlled Insurance Program

16.1.6.1 The Department has elected to implement an owner-controlled insurance program (OCIP) for the Project. The Department will administer the OCIP with the assistance of an OCIP Administrator. The Department assumes no obligation to provide insurance coverages other than those set forth in the actual OCIP policies.

16.1.6.2 The OCIP is a series of insurance policies issued by one or more insurance companies to provide certain types of coverages for Construction Work performed by Developer and eligible Contractors of all tiers. These coverages consist of (a) workers' compensation, (b) general liability, including excess liability and ten years of completed operations coverage, and (c) contractor's pollution liability. The coverages under the OCIP are more particularly described in Section 16.1.6.8. The OCIP does not provide builder's risk, professional liability, surety insurance any other type of insurance or suretyship not specifically described in Section 16.1.6.8. The OCIP does not prohibit participants from purchasing any additional liability insurance. Costs for any other insurance coverage maintained by the enrolled parties, including such costs in connection with Relief Events, will not be reimbursable.

16.1.6.3 Coverage under the OCIP applies only to construction activities under the Contract Documents performed at the OCIP Site. Areas adjacent to or near the OCIP Site where incidental operations are performed may be covered, but only if they are solely dedicated to Construction Work and reported to the OCIP Administrator and the OCIP Administrator has confirmed that they are covered. Unless approved by the Department and accepted and endorsed on the policy by the OCIP insurer, locations outside the OCIP Site are not covered under the OCIP even if the outside location is utilized as a batch plant dedicated to the Project or operations are for fabrication of materials to be used at the Site or training of

apprentices. Locations outside the OCIP Site include the regularly established workplace, plant, factory, office, shop, warehouse, yard or other property of Developer or any Contractor. Operations of Developer or an enrolled Contractor outside the OCIP Site, including product manufacturing or product assembling, may be covered if Developer or the Contractor requests coverage for specified operations and the operations are:

1. Solely dedicated to the performance of the Construction Work;
2. Approved in writing by the Department;
3. Approved by the OCIP insurer and endorsed onto the general liability and workers' compensation OCIP insurance policies; and
4. Acknowledged in writing by the OCIP Administrator.

16.1.6.4 The insurance provided under the OCIP does not extend coverage for product liability to other parties such as vendors and Suppliers, for any product manufactured, assembled, or worked on away from the OCIP Site.

16.1.6.5 Eligibility and enrollment in the OCIP are governed by the following terms.

1. Developer shall participate in the OCIP's CGL policy coverage as an additional insured, and in the OCIP's pollution liability coverage as a named insured. Developer is not eligible for participation in the OCIP's worker's compensation coverage.
2. Participation in the OCIP by eligible Contractors is mandatory but not automatic. The OCIP will apply to eligible Contractors only if and when they are enrolled. Developer shall cause each eligible Contractor to enroll in the OCIP before starting work on the Site by submitting CT OCIP Form 1, "OCIP Enrollment Form."
3. Eligible Contractors are Contractors who provide direct labor for construction activities at the OCIP Site. Temporary labor services and employee leasing companies are to be treated as eligible Contractors if the services provided are construction activities at the OCIP Site.
4. Enrolled Contractors are Contractors who have completed the enrollment procedures and received evidence of OCIP insurance. The enrollment process includes completion and acceptance of the forms included in the OCIP enrollment package.
5. Excluded Contractors are:
 - (a) Architects, engineers, surveyors, soil testing companies, and their consultants;
 - (b) Hazardous waste transport companies;
 - (c) Suppliers, vendors, and material dealers that do not perform

construction activities at the Site or subcontract installation;

(d) Guard services and non-construction janitorial services; and

(e) Truckers including trucking to the Project where delivery is the only scope of work performed, haulers, drivers, and others who merely transport, pick up, deliver or carry materials, personnel, parts, and equipment to or from the Site.

6. If an excluded Contractor performs direct labor at the OCIP Site, it shall participate in the project safety program and comply with the safety requirements in the Technical Requirements.
7. OCIP insurance policies and OCIP coverages will not apply to excluded Contractors, even if such Contractors are erroneously enrolled in the OCIP. Developer is obligated to provide or cause to be provided insurance coverage for excluded Contractors as provided in Section 16.1.2.5, without the right to additional compensation for the premiums of such coverages.
8. The OCIP insurer reserves the right to reject late OCIP enrollments. If there have been losses in a period during which Developer or a Contractor delayed its enrollment, the OCIP will not furnish coverage to Developer or the Contractor for such losses and Developer will be deemed to have self-insured such losses under Section 16.1.4.3.

16.1.6.6 The Department shall have the right to disqualify any eligible Contractor that fails or refuses to enroll in the OCIP before starting Work at the Site, unless it becomes properly enrolled within three Business Days after the Department or OCIP Administrator delivers to Developer notice demanding enrollment. Developer shall immediately remove from the Site any Contractor so disqualified.

16.1.6.7 If not previously included in the Reference Documents, the Department will provide Developer an "Owner Controlled Insurance Program (OCIP) Manual," (the "**OCIP Manual**") which describes the program and provides guidelines for participation in the OCIP. The OCIP Manual includes a summary of the insurance coverage, loss control procedures and claim procedures as well as enrollment forms and reporting requirements for the OCIP. Developer shall, and shall cause all enrolled Contractors to, use and comply with the requirements contained in the OCIP Manual, including the enrollment procedures. Neither Developer nor any Contractor has the authority to change or waive any such requirements or procedures. Each enrolled Contractor will receive from the OCIP Administrator a separate workers' compensation policy. A copy of the primary general liability, excess liability and contractor's pollution liability policies will be available from the OCIP Administrator.

16.1.6.8 The insurance coverage under the OCIP is summarized as follows:

1. Workers compensation insurance is provided on a statutory basis. If there is an exposure of injury to Developer's or an eligible Contractor's employees under the U.S. Longshore and Harbor Workers' Compensation Act, the Jones Act, or under laws, regulations or statutes applicable to maritime employees, coverage is included for such injuries or claims. Employer's liability insurance is provided in amounts not less than:

- (a) \$1,000,000 for each accident for bodily injury by accident;
 - (b) \$1,000,000 policy limit for bodily injury by disease; and
 - (c) \$1,000,000 for each employee for bodily injury by disease.
2. General liability insurance: The general annual aggregate limit is annually reinstated each policy year. Defense coverage is in addition to the policy limits. Completed-operations coverage will be extended for ten years beyond the earlier of the Final Acceptance Date or expiration of the final OCIP policies. A single limit applies for the ten-year period. Limits for bodily injury, including death arising from the bodily injury, and property damage are:
- (a) \$2,000,000 for each occurrence;
 - (b) \$4,000,000 aggregate for completed operations; and
 - (c) \$4,000,000 general annual aggregate.
3. Umbrella or Excess Liability Insurance limits are not less than \$200,000,000 per occurrence and in the aggregate. Coverage is excess and following form to the commercial general liability and employer's liability policies. General aggregate limits are annually reinstated.
4. Contractor Pollution Liability with a limit of \$25,000,000 per occurrence and in the aggregate. Coverage extends to hazardous materials transport and treatment / disposal facilities.

16.1.6.9 The descriptions of the OCIP coverages set forth in this Section 16.1.6 are not intended to be complete or meant to alter or amend any provision of the actual OCIP policies. The OCIP policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions are set forth in full in their respective policy forms. In the event of a conflict or omission between the policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions described in the OCIP policies and the summary or description thereof in this Section 16.1.6, the OCIP Manual, or elsewhere in the Contract Documents, the policy limits, coverage terms, coverage exclusions and limitations, and other policy terms and conditions set forth in the actual OCIP policies issued by the OCIP insurers shall control. In the event of a conflict between the provisions of this Section 16.1.6 and the OCIP Manual that does not involve any conflict with the provisions of the actual OCIP policies issued by the OCIP insurers, then the provisions of this Section 16.1.6 shall govern.

16.1.6.10 The Department will pay all OCIP premiums. The Department will be the sole beneficiary of any dividends or return premiums generated by the OCIP. In consideration of the Department providing an OCIP, Developer, on behalf of itself and all its Contractors, waives any right to and shall irrevocably assign to and for the benefit of the Department, all return premiums, premium refunds, premium discounts, dividends, retentions, credits, and any other moneys due the Department in connection with the OCIP. Upon the Department's request, Developer shall promptly execute and deliver, and cause all enrolled Contractors at all tiers to execute and deliver, an assignment thereof, in form prepared by the Department.

16.1.6.11 Developer shall cooperate, and cause its enrolled Contractors to cooperate, with the Department in the administration and operation of the OCIP. Such cooperation shall include the following measures:

1. Provide to the Department, its insurance representatives and the insurance company all information and documentation which the OCIP may require in connection with the issuance or maintenance of any OCIP policies, in such form and substance as the Department or its designee may require;
2. Provide to the Department, its insurance representative and the insurance company, on a monthly basis for the prior month (including months with no payroll), on-Site payroll reports on the form required and described in the OCIP Manual, and such other payroll records relating to the Construction Work as may be necessary for the proper computation of the insurance premiums. The Department shall have the right to withhold Milestone Payments and other compensation until the Department or its designee receives such payroll reports and records;
3. For a period of up to three years after the Final Acceptance Date or completion of any warranty work covered by the OCIP, whichever is later, permit the Department, its insurance representative and the insurance company to audit the enrolled parties' books and records and provide documentation as may be required to assure accuracy of those payroll reports and records;
4. Promptly comply with the requirements, obligations and recommendations of the Department, its insurance representative or insurance company so that the OCIP may be properly administered and so that the insurance companies will continue to provide the OCIP coverage as described in this Section 16.1.6. If the enrolled parties should fail to comply with any requirement, obligation or recommendation, the Department may, in addition to any other remedy, withhold Milestone Payments and other compensation until the enrolled parties comply with such requirements, obligations and recommendations;
5. Include OCIP provisions in all Contracts of eligible Contractors and notify the Department and its insurance representative of all Contracts awarded to eligible Contractors; and
6. Comply with applicable loss control (safety) and claims reporting procedures,
7. Maintain and have available the records identified above for a period of up to three years after the Final Acceptance Date or completion of any warranty work covered by the OCIP, whichever is later.

16.1.6.12 Developer or the enrolled Contractor primarily responsible for causing any bodily injury or property damage liability loss shall be responsible for payment of a deductible assessment in accordance with the following terms and conditions.

1. The assessment will equal, in the case of Developer, \$25,000, or in the case of a Contractor, its regular (non-OCIP) commercial general liability policy

deductible or self-insured retention up to a maximum assessment of \$25,000. The minimum assessment shall be the actual loss or \$5,000, whichever is less. The assessment shall be applied on the same basis as applied under the Contractor's regular (non-OCIP) general liability insurance policy. Developer shall cause the enrolled Contractor to submit to the Department a copy of the Contractor's commercial general liability insurance certificate for the purpose of determining the deductible assessment.

2. If the loss exceeds \$5,000 and information necessary to determine the Contractor's deductible as stated on its commercial general insurance certificate is not available to the Department, the Department will charge the Contractor the actual loss up to a \$25,000 maximum per occurrence until receipt of documentation from the Contractor's commercial general insurance policy evidencing the contractor's actual deductible. If the loss is less than \$5,000, the Department will charge the actual loss. The Department will charge the Contractor deductible assessment by processing administrative deductions on the Contractor's progress payments. At the option of the Department, the contractor deductible assessment may also be processed by direct billing, construction change orders, or any other method deemed appropriate by the Department.
3. The deductible assessment will apply to contractor pollution liability losses using the same terms and conditions described above except that in the case of a Contractor the assessment for such losses shall be determined by the deductible on the Contractor's pollution liability policy subject to the minimum assessment of \$5,000 or actual loss, whichever is less. In the event that the Contractor does not have a contractor's pollution liability policy, the Contractor's general liability policy deductible will be used to determine the assessment subject to the minimums described above.
4. The deductible assessment does not apply to workers' compensation claims for Developer's or a Contractor's own employee.

16.1.6.13 The Department reserves the right to terminate or modify all or part of the OCIP with 30 days prior written notice. In the event of termination or modification, Developer and its enrolled Contractors of all tiers shall procure and maintain insurance required by the Department to replace the OCIP coverage. The Department will reimburse to Developer the cost of insurance replacement, including associated Project costs that may arise due to such insurance replacement. The form, coverage, limits, cost, and insurer rating for the replacement insurance shall be subject to the Department approval.

16.1.6.14 Except for completed operations coverage, OCIP insurance coverage for Developer will terminate upon Final Acceptance and OCIP insurance coverage for an enrolled Contractor will terminate upon that Contractor's completion of Construction Work at the Site. Developer shall complete the OCIP notice of work completion form as part of the punch-list and Final Acceptance. If a Contractor returns to the job site to perform warranty work, it must perform warranty work under its own worker's compensation insurance coverage; warranty work is covered only under the OCIP general liability insurance policy provided such work is performed within one year after acceptance of the subject Contractor's work.

16.1.6.15 Developer shall be responsible for compliance with the requirements of this Section 16.1.6 including compliance by its enrolled Contractors and by its excluded Contractors of all tiers.

16.1.6.16 Developer agrees that the Department and the OCIP Administrator are not agents, partners, or guarantors of the OCIP insurer and that the Department is not responsible for any claims or disputes between or among Developer, the Contractors, and any OCIP insurer.

16.2 Performance and Payment Security

16.2.1 Performance Security

16.2.1.1 Developer shall, as a condition to the commencement of Design Work and the Department's issuance of NTP 1 obtain Performance Security in an amount equal to ____ Million United States Dollars (US\$____,000,000) securing Developer's performance of the Design Work necessary to enable Developer to obtain NTP 2. The Performance Security required by this Section 16.2.1.1 shall be released upon Developer's submission of the Performance Security required by Section 16.2.1.2.

16.2.1.2 Developer shall, as a condition to the Department's issuance of NTP 2 and the commencement of Construction Work and O&M Work, obtain Performance Security in an amount equal to _____ Million United States Dollars (US\$____,000,000), securing Developer's performance of: (a) the D&C Work; and (b) the O&M Work performed during the Construction Period.

16.2.1.3 The Performance Security required under Sections 16.2.1.1 and 16.2.1.2 may, at Developer's option, secure the performance of the Lead Engineering Firm and Lead Contractor rather than Developer's performance.

16.2.1.4 Prior to commencing any Design Work or Construction Work during the Operating Period, Developer shall obtain the Department's written approval of the form and amount of Performance Security for such Design Work or Construction Work.

16.2.1.5 If the Performance Security required by this Section 16.2.1 is in the form of a surety bond, it must be in the form set forth in Appendix 16, and must be issued by a surety or an insurance company authorized to issue bonds in the State that is rated in the top two categories by two of the three nationally recognized rating agencies or at least A- or better and "AX" or better according to A.M. Best's Financial Strength Rating and Financial Size Category except as otherwise approved in writing by the Department in its reasonable discretion. The surety bond must include a multiple obligee rider in the form of Appendix 16. Developer may elect to procure the surety bond directly rather than rely upon its Lead Contractor to do so as contemplated by the forms contained in Appendix 16. If Developer makes this election, a multiple obligee rider is not necessary, and the language of the bond form may be adjusted to reflect the election, but only as necessary to eliminate references to the Lead Contractor and to add the Department. Subject to the Lender's rights under the Direct Agreement, proceeds from a call on the surety bonds by Developer shall be placed in a trust account and used solely for purposes of remedying the underlying performance default and the payment of any other moneys due under [Section ____ of Division ____]. If the Performance Security is in the form of a letter of credit, the letter of credit must be in the form of Appendix 15, and comply with the requirements of Sections 16.2.3 and 16.3. In satisfying

its obligations under this Section 16.2.1, Developer may switch from a compliant surety bond to a compliant letter of credit (or vice versa) provided that Developer gives the Department [30] days prior written notice of its intention to switch and provided that at all times there remains in place a compliant surety bond or a compliant letter of credit.

16.2.2 Payment Security

16.2.2.1 Developer shall, as a condition to commencement of Design Work and the Department's issuance of NTP 1, obtain a Payment Security in the amount of ___ Million United States Dollars (US\$ ___,000,000) securing Developer's obligation to pay for labor and materials associated with the Design Work necessary to enable Developer to obtain NTP 2. The Payment Security required by this Section 16.2.2.1 shall be released upon Developer's submission of the Payment Security required by Section 16.2.2.2.

16.2.2.2 Developer shall, as a condition to the Department's issuance of NTP 2 and the commencement of Construction Work, obtain a Payment Security in an amount equal to ___ Million United States Dollars (US\$ ___,000,000), securing Developer's obligation to pay for labor and materials in connection with the: (a) D&C Work; and (b) the O&M Work performed during the Construction Period.

16.2.2.3 If the Payment Security required by this Section 16.2.2 is issued in the form of a bond it must be issued in the form set forth in Appendix 16, and must be issued by a surety or an insurance company authorized to issue bonds in the State that is rated in the top two categories by two of the three nationally recognized rating agencies or at least A- or better and "AX" or better according to A.M. Best's Financial Strength Rating and Financial Size Category except as otherwise approved in writing by the Department in its reasonable discretion. If the Payment Security is issued in the form of a bond it must include a multiple obligee rider in the form of Appendix 16. Developer may elect to procure the Payment Security directly rather than rely upon its Lead Contractor to do so as contemplated by the forms contained in Appendix 16. If Developer makes this election, and the Payment Security is issued in the form of a bond, a multiple obligee rider is not necessary, and the language of the bond form may be adjusted to reflect the election, but only as necessary to eliminate references to the Lead Contractor and to add the Department. [If the Performance Security is in the form of a letter of credit, the letter of credit must be in the form of Appendix 15, and comply with the requirements of Section 16.2.3 and 16.3. In satisfying its obligations under this Section 16.2.2, Developer may switch from a compliant surety bond to a compliant letter of credit (or vice versa) provided that Developer gives the Department [30] days prior written notice of its intention to switch and provided that at all times there remains in place a compliant surety bond or a compliant letter of credit.]

16.2.2.4 The Payment Security required under Sections 16.2.2.1 and 16.2.2.2 may, at Developer's option, secure the payment obligations of the Lead Engineering Firm and Lead Contractor rather than Developer's payment obligations.

16.2.2.5 Prior to commencing any Design Work or Construction Work during the Operating Period, Developer shall obtain the Department's written approval of the form and amount of Payment Security for such Design Work or Construction Work.

16.2.3 Collateral Agent as Letter of Credit Beneficiary

Notwithstanding Section 16.3.2.7, the Collateral Agent may be named as the beneficiary

of any letter of credit provided as Performance Security or Payment Security, but only if the following terms and conditions are satisfied.

16.2.3.1 The letter of credit shall expressly authorize assignment and transfer of the beneficiary rights thereunder from the Collateral Agent to the Department without condition or limitation and shall expressly permit the Department, as beneficiary, to draw without presentation of the original letter of credit.

16.2.3.2 The letter of credit for Payment Security or Performance Security also shall name the Department as automatic and exclusive transferee beneficiary upon Final Acceptance, and upon final acceptance of any Construction Work during the Operating Period (or, if applicable, Developer's final acceptance of the work under the Contract with the Lead Engineering Firm, Lead Contractor or other prime Contractor for the original or subsequent Construction Work).

16.2.3.3 The Collateral Agent may draw on the letter of credit solely for the following purposes:

1. Paying or reimbursing its costs of curing Developer's failure to perform its obligations under the Contract Documents respecting the secured Work (or, if applicable, paying or reimbursing Developer or itself for costs of curing the Lead Engineering Firm's, Lead Contractor's, or other prime Contractor's failure to perform its performance obligations under its respective Contract), or
2. Depositing the proceeds as cash security in a cash collateral account for the benefit of the Collateral Agent and the Department, useable only for the purposes specified in clause (1) above, where the letter of credit will expire within 50 days and has not been replaced or extended pursuant to Section 16.3.3, provided that the terms of the cash collateral account shall unconditionally entitle the Department to draw thereon whenever, and to the extent that, the Department would have the right to draw on the letter of credit under this Section 16.2 had it not expired.

16.2.3.4 The Collateral Agent first commits in writing to the Department to provide written notice to the Department within two Business Days after making a draw on the letter of credit, indicating the date, amount and purpose of the draw in reasonable detail.

16.2.3.5 Developer has delivered to the Department, concurrently with the issuance of such letter of credit, a certified copy of the letter of credit and a present, executed transfer and assignment of the beneficiary rights from the Collateral Agent to the Department and documents reasonably satisfactory to the Department that permit the Department to exercise its rights as the transferee beneficiary under such letter of credit and to make drawings thereunder as and when set forth in Section 16.3.3.

16.2.3.6 Developer (or, if applicable, the Lead Engineering Firm, Lead Contractor and other prime Contractor) shall bear any fees charged by the issuer of the letter of credit for transferring the beneficiary rights thereunder.

16.2.4 Forbearance

The Department shall forbear from exercising remedies as an additional obligee under any surety bond provided as Performance Security or Payment Security so long as Developer or the Collateral Agent (a) commences the good faith, diligent exercise of remedies thereunder within 30 days after the Department delivers written notice to Developer and the Collateral Agent of its intent to make a claim thereunder, and (b) thereafter continues such good faith, diligent exercise of remedies until the default is cured.

16.3 Letters of Credit

16.3.1 Any terms and conditions applicable to a particular letter of credit which Developer is required to or may provide under this Agreement are set forth in the provisions of this Agreement describing such letter of credit. Wherever in the Contract Documents Developer has the option or obligation to deliver to the Department a letter of credit, the provisions of this Section 16.3 shall apply:

16.3.2 The letter of credit shall:

16.3.2.1 Be a direct pay, standby letter of credit;

16.3.2.2 Be issued by a financial institution in the form of Appendix 15 and acceptable to the Department's Chief Financial Officer. If the bank issuing the letter of credit fails to maintain an unsecured long-term debt rating of at least ["A"] from one of the major national rating agencies, Developer shall provide a substitute letter of credit issued by a qualified financial institution within [30] days of the date that the prior financial institution failed to maintain compliance with the requirements of this Section 16.3 or otherwise furnish additional security acceptable to the Department's Chief Financial Officer as may be required from time to time to protect the interests of the Department;

16.3.2.3 Be consistent with the requirements of this Section 16.3;

16.3.2.4 Be payable immediately, conditioned only on written presentment from the Department to the issuer of a sight draft drawn on the letter of credit and a certificate stating that the Department has the right to draw under the letter of credit in the amount of the sight draft, up to the amount due to the Department, without requirement to present the original letter of credit;

16.3.2.5 Be in place for the entire period of time for which the letter of credit is providing security. Letters of credit with an expiration date shall provide for automatic renewal no later than [30] days prior to the expiration date;

16.3.2.6 Allow for multiple draws; and

16.3.2.7 Name the Department as payee. The letter of credit shall not provide for dual or multiple beneficiaries except as provided in Section 16.2.2.

16.3.3 The Department shall have the right to draw on the letter of credit, without prior notice unless otherwise expressly provided in the Contract Documents with respect to the letter of credit, and use and apply the proceeds as provided in the Contract Documents for such letter of credit, if (a) Developer fails to pay or perform when due the duty, obligation or liability under the Contract Documents for which the letter of credit is held, (b) Developer for any reason fails

to deliver to the Department a new or replacement letter of credit, on the same terms, by not later than [14] days before the expiration date of the outstanding letter of credit, unless the applicable terms of the Contract Documents expressly require no further letter of credit with respect to the duty, obligation or liability in question, or (c) the financial institution issuing the Renewal Work Letter of Credit fails to meet the requirements set forth in Section 16.3.2.2 and Developer fails to provide a substitute letter of credit issued by a qualified financial institution within [30] days. For all draws conditioned on prior written notice from the Department to Developer, no such notice shall be required if it would preclude draw before the expiration date of the letter of credit. Draw on the letter of credit shall not be conditioned on prior resort to any other security of Developer.

16.3.4 Developer's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from the Department a refund of the proceeds which are misapplied and the reasonable costs Developer incurs as a result of such misapplication; provided that at the time of such refund Developer increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Agreement. Developer acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause Developer injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Developer covenants (a) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (b) not to commence or pursue any legal proceeding seeking, and Developer irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

16.3.5 Developer shall obtain and furnish all letters of credit and replacements thereof at its sole cost and expense, and shall pay all charges imposed in connection with the Department's presentment of sight drafts and drawing against letters of credit or replacements thereof.

16.3.6 In the event the Department's rights and interests under this Agreement are assigned, Developer shall cooperate so that concurrently with the effectiveness of such assignment, either replacement letters of credit for, or appropriate amendments to, the outstanding letters of credit shall be delivered to the assignee naming the assignee as beneficiary, at no cost to Developer.

16.4 Indemnity by Developer

16.4.1 Subject to Section 16.4.2, Developer shall release, defend, protect, indemnify and hold harmless the Indemnified Parties from and against any and all liabilities, damages, claims, fines, causes of action, suits, judgments, investigations, legal or administrative proceedings, demands and Losses, in each case if asserted or incurred by or awarded to any third party, to the extent caused by or arising out of:

16.4.1.1 The breach or alleged breach of the Contract Documents or any Contract by any Developer-Related Entity;

16.4.1.2 The failure or alleged failure by any Developer-Related Entity to comply with the Governmental Approvals, any applicable Environmental Laws or other Laws (including Laws regarding Hazardous Materials management);

16.4.1.3 Any alleged patent, trademark, or copyright infringement or other allegedly improper appropriation or use by any Developer-Related Entity of trade secrets, patents, proprietary information, know-how, copyright rights, inventions or other third-party proprietary rights in performance of the Work, or arising out of any use in connection with the Project of methods, processes, designs, information, or other items furnished or communicated to the Department or another Indemnified Party pursuant to the Contract Documents; provided that this indemnity shall not apply to any infringement resulting from the Department's failure to comply with specific written instructions regarding use provided to the Department by Developer;

16.4.1.4 The actual or alleged negligence, willful misconduct, breach of applicable Law or contract, or other culpable act, culpable omission or misconduct of any Developer-Related Entity in or associated with performance of the Work;

16.4.1.5 Any and all claims by any governmental or taxing authority claiming Taxes based on gross receipts, purchases or sales, the use of any property or income of any Developer-Related Entity with respect to any payment for the Work made to or earned by any Developer-Related Entity;

16.4.1.6 Any and all stop notices and/or liens filed in connection with the Work, including all expenses and attorneys', accountants' and expert witness fees and costs incurred in discharging any stop notice or lien, and any other liability to Contractors, laborers and Suppliers for failure to pay sums due for their work, services, materials, goods, equipment or supplies, provided that the Department is not in default in payments owing to Developer with respect to such Work;

16.4.1.7 Any actual or threatened Release of Hazardous Materials by any Developer-Related Entity;

16.4.1.8 The claim or assertion by any other developer or contractor of inconvenience, disruption, delay or loss caused by interference by any Developer-Related Entity with or hindering the progress or completion of work being performed by the other developer or contractor, or failure of any Developer-Related Entity to cooperate reasonably with other developers or contractors in accordance therewith;

16.4.1.9 Any dispute between Developer and a Utility Owner, or any Developer-Related Entity's performance of, or failure to perform, the obligations under any Utility Agreement;

16.4.1.10 (a) Any Developer-Related Entity's breach of or failure to perform an obligation that the Department owes to a third Person, including Governmental Entities, under Law or under any agreement between the Department and a third Person, where the Department has delegated performance of the obligation to Developer under the Contract Documents, or (b) the acts or omissions, including negligence, willful misconduct or breach of applicable Law or contract, of any Developer-Related Entity which render the Department unable to perform or abide by an obligation that the Department owes to a third Person, including Governmental Entities, under any agreement between the Department and a third Person, where the agreement is previously disclosed or known to Developer;

16.4.1.11 The fraud, bad faith, arbitrary or capricious acts, willful misconduct, negligence or violation of Law or contract by any Developer-Related Entity in connection with Developer's performance of real property acquisition services under the Contract Documents;

16.4.1.12 Inverse condemnation, trespass, nuisance or similar taking of or harm to real property by reason of (a) the failure of any Developer-Related Entity to comply with Best Management Practice, requirements of the Contract Documents, Project Management Plan or Governmental Approvals respecting control and mitigation of construction activities and construction impacts, (b) the intentional misconduct or negligence of any Developer-Related Entity, or (c) the actual physical entry onto or encroachment upon another's property outside the Project Right of Way by any Developer-Related Entity;

16.4.1.13 If applicable, any violation of any federal or state securities or similar law by any Developer-Related Entity, or Developer's failure to comply with any requirement necessary to preserve the tax exempt status of interest paid on the PABs; or

16.4.1.14 Errors, inconsistencies or other defects in the design or construction of the Project.

16.4.2 Subject to Section 16.4.4 and the releases and disclaimers herein, including all the provisions set forth in Section 3.3.7, Developer's indemnity obligation shall not extend to any Loss to the extent caused by:

16.4.2.1 The negligence, reckless or willful misconduct, bad faith or fraud of such Indemnified Party; or

16.4.2.2 A Relief Event, subject to Developer's obligations as provided for in this Agreement; or

16.4.2.3 A Structural Latent Defect, but only if (a) Developer did not previously encounter the Structural Latent Defect and fail to undertake rehabilitation in accordance with Section 4.14.4 and (b) no Developer-Related Entity caused or contributed to causing the Structural Latent Defect.

16.4.3 In claims by an employee of Developer, a Contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 16.4 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Developer or a Contractor under workers' compensation, disability benefit or other employee benefits laws.

16.4.4 For purposes of this Section 16.4, a third party claim includes a claim, dispute, disagreement, cause of action, demand, suit, action, judgment, investigation, or legal or administrative proceeding which (a) is asserted, initiated or brought by any Indemnified Party's employee, agent or contractor against an Indemnified Party, (b) is within the scope of the indemnities and (c) is not covered by the Indemnified Party's worker's compensation program. For purposes of this Section 16.4, a third party Loss includes any actual or alleged Loss sustained or incurred by such employee, agent or contractor.

16.5 Defense and Indemnification Procedures

16.5.1 If the Department receives notice of a claim or otherwise has actual knowledge of

a claim that it believes is within the scope of the indemnities under Section 16.4, and if the Department gives notice thereof pursuant to Section 16.1.4.3, then the Department shall have the right to conduct its own defense unless either an insurer accepts defense of the claim within the time required by Law or Developer accepts the tender of the claim in accordance with Section 16.5.3.

16.5.2 If the insurer under any applicable Insurance Policy accepts the tender of defense, the Department and Developer shall cooperate in the defense as required by the Insurance Policy. If no insurer under potentially applicable Insurance Policies provides defense, then Section 16.5.3 shall apply.

16.5.3 If the defense is tendered to Developer, then within 30 days after receipt of the tender it shall notify the Department whether it has tendered the matter to an insurer and (if not tendered to an insurer or if the insurer has rejected the tender) shall deliver a written notice stating that Developer:

16.5.3.1 Accepts the tender of defense and confirms that the claim is subject to full indemnification hereunder without any "reservation of rights" to deny or disclaim full indemnification thereafter;

16.5.3.2 Accepts the tender of defense but with a "reservation of rights" in whole or in part; or

16.5.3.3 Rejects the tender of defense based on a determination that it is not required to indemnify against the claim under the terms of this Agreement.

16.5.4 If Developer accepts the tender of defense under Section 16.5.3.1, Developer shall have the right to select legal counsel for the Indemnified Parties, subject to reasonable approval by the Department, and Developer shall otherwise control the defense of such claim, including settlement, and bear the fees and costs of defending and settling such claim. During such defense:

16.5.4.1 Developer shall fully and regularly inform the Indemnified Parties of the progress of the defense and of any settlement discussions; and

16.5.4.2 The Department shall fully cooperate in said defense, provide to Developer all materials and access to personnel it requests as necessary for defense, preparation and trial and which or who are under the control of or reasonably available to the Department, and maintain the confidentiality of all communications between it and Developer concerning such defense.

16.5.5 If Developer responds to the tender of defense as specified in Section 16.5.3.2 or 16.5.3.3, the Indemnified Parties shall be entitled to select their own legal counsel and otherwise control the defense of such claim, including settlement.

16.5.6 Indemnified Parties may assume their own defense by delivering to Developer written notice of such election and the reasons therefor, if the Department, at the time it gives notice of the claim or at any time thereafter, reasonably determines that:

16.5.6.1 A conflict exists between the Indemnified Parties and Developer which prevents or potentially prevents Developer from presenting a full and effective defense;

16.5.6.2 Developer is otherwise not providing an effective defense in connection with the claim; or

16.5.6.3 Developer lacks the financial capacity to satisfy potential liability or to provide an effective defense.

16.5.7 If the Indemnified Parties are entitled and elects to conduct their own defense pursuant hereto of a claim for which they are entitled to indemnification, Developer shall reimburse on a current basis all reasonable costs and expenses the Indemnified Parties incur in investigating and defending. In the event the Indemnified Parties are entitled to and elect to conduct their own defense, then:

16.5.7.1 In the case of a defense conducted under Section 16.5.3.1, the Indemnified Parties shall have the right to settle or compromise the claim with Developer's prior written consent, which shall not be unreasonably withheld or delayed;

16.5.7.2 In the case of a defense conducted under Section 16.5.3.2, the Indemnified Parties shall have the right to settle or compromise the claim with Developer's prior written consent, which shall not be unreasonably withheld or delayed, or with approval of the court or arbitrator following reasonable notice to Developer and opportunity to be heard and without prejudice to their rights to be indemnified by Developer; and

16.5.7.3 In the case of a defense conducted under Section 16.5.3.3, the Indemnified Parties shall have the right to settle or compromise the claim without Developer's prior written consent and without prejudice to their rights to be indemnified by Developer.

16.5.8 A refusal of, or failure to accept, a tender of defense, as well as any Dispute over whether an Indemnified Party which has assumed control of defense is entitled to do so under Section 16.5.6, shall be resolved according to the Dispute Resolution Procedures. Developer shall be entitled to contest an indemnification claim and pursue, through the Dispute Resolution Procedures, recovery of defense and indemnity payments it has made to or on behalf of the Indemnified Parties.

16.5.9 The Parties acknowledge that while Section 16.4, contemplates that Developer will have responsibility for certain claims and liabilities arising out of its obligations to indemnify, circumstances may arise in which there may be shared liability of the Parties with respect to such claims and liabilities. In such case, where either Party believes a claim or liability may entail shared responsibility and that principles of comparative negligence and indemnity are applicable, it shall confer with the other Party on management of the claim or liability in question. If the Parties cannot agree on an approach to representation in the matter in question, each shall arrange to represent itself and to bear its own costs in connection therewith pending the outcome of such matter. Within 30 days subsequent to the final, non-appealable resolution of the matter in question, whether by arbitration or by judicial proceedings, the Parties shall adjust the costs of defense, including reimbursement of reasonable attorneys' fees and other litigation and defense costs, in accordance with the indemnification arrangements of Section 16.4, and consistent with the outcome of such proceedings concerning the respective liabilities of the Parties on the third party claim.

16.5.10 In determining responsibilities and obligations for defending suits pursuant to this Section 16.5, specific consideration shall be given to the following factors: (a) the party performing the activity in question; (b) the location of the activity and incident; (c)

contractual arrangements then governing the performance of the activity; and (d) allegations of respective fault contained in the claim.

16.6 Disclaimer

Nothing in this Article 16 or elsewhere in the Contract Documents is intended to establish a standard of care owed to any member of the public or to extend to the public the status of a third-party beneficiary for any of the insurance or indemnifications described in this Article 16.

ARTICLE 17. REPRESENTATIONS AND WARRANTIES

17.1 Developer Representations and Warranties

Developer hereby represents and warrants to the Department as follows:

17.1.1 The Financial Model Formulas (a) were prepared by or on Developer's behalf in good faith, (b) are the same financial formulas that Developer utilized and is utilizing in the Financial Model, in making its decision to enter into this Agreement and in making disclosures to potential equity investors and Lenders under the Initial Funding Agreements, and (c) as of the Effective Date are suitable for making reasonable projections.

17.1.2 The Original Financial Model and Financial Model (a) were prepared by or on Developer's behalf in good faith, (b) were audited and verified by an independent recognized model auditor prior to the Effective Date, (c) fully disclose all cost, revenue and other financial assumptions and projections that Developer has used or is using in making its decision to enter into this Agreement and in making disclosures to Lenders under the Initial Funding Agreements and (d) as of the Effective Date represent the projections that Developer believes in good faith are the most realistic and reasonable for the Project; provided, however, that such projections (i) are based upon a number of estimates and assumptions, (ii) are subject to significant business, economic and competitive uncertainties and contingencies, and (iii) accordingly are not a representation or warranty that any of the assumptions are correct, that such projections will be achieved or that the forward-looking statements expressed in such projections will correspond to actual results.

17.1.3 Developer has reviewed all applicable Laws relating to Taxes, has taken into account all requirements imposed by such Laws in preparing the Original Financial Model and Financial Model, and agrees to pay, prior to delinquency, all applicable Taxes. Further, Developer accepts sole responsibility and agrees that it shall have no right to compensation or other claim due to its misinterpretation of such Laws or incorrect assumptions regarding the applicability of Taxes.

17.1.4 Developer and its Contractor(s) have maintained, and throughout the term of this Agreement shall maintain, all required authority, license status, professional ability, skills and capacity to perform the Work.

17.1.5 Without limiting its rights and remedies expressly granted hereunder, Developer has evaluated the constraints affecting design and construction of the Project, including the Project Right of Way as defined in the Right of Way Plans as well as the terms and conditions of the NEPA/CEQA Approval, Presidio Trust Right of Entry Agreement and Programmatic

Agreement, and has reasonable grounds for believing and does believe that the Project can be designed and built within such constraints.

17.1.6 Without limiting its rights and remedies expressly granted hereunder, Developer has, in accordance with Best Management Practice, examined the Site and surrounding locations, performed appropriate field studies and investigations of the Site, investigated and reviewed the subsurface data attached, the Hazardous Materials information, the Utility information and other available public and private records, and undertaken other activities sufficient to familiarize itself with surface conditions and subsurface conditions, including the presence of Utilities, Hazardous Materials, contaminated groundwater, archaeological, paleontological and cultural resources, and endangered and threatened species, affecting the Site or surrounding locations; and as a result of such review, inspection, examination and other activities Developer is familiar with and, subject to the provisions of this Agreement, accepts the physical requirements of the Work.

17.1.7 Developer has familiarized itself with the requirements of any and all applicable Laws, including those Laws applicable to the use of federal-aid funds, and the conditions of any required Governmental Approvals prior to entering into this Agreement. Without limiting the foregoing, Developer is aware of the provisions of Section 3700 of the California Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that Code. Developer will comply with such provisions before commencing performance of the Work under the Contract Documents and at all times during the Term. The foregoing representation shall constitute the certificate concerning such compliance required by Section 1861 of the California Labor Code.

17.1.8 Except as specifically provided otherwise in this Agreement, Developer shall be responsible for complying with the foregoing at its sole cost and without any increase in compensation or extension of the Financial Close Deadline or any Completion Deadline on account of such compliance, regardless of whether such compliance would require additional time for performance or additional labor, equipment and/or materials not expressly provided for in the Contract Documents. Developer has no reason to believe that any Governmental Approval required to be obtained by Developer will not be granted in due course and, thereafter, remain in effect so as to enable the Work to proceed in accordance with the Contract Documents.

17.1.9 All Work furnished by Developer will be performed by or under the supervision of Persons who hold all necessary, valid licenses to practice in the State, by personnel who are skilled, experienced and competent in their respective trades or professions, who are professionally qualified to perform the Work in accordance with the Contract Documents and who shall assume professional responsibility for the accuracy and completeness of the Design Documents, Construction Documents and other documents prepared or checked by them.

17.1.10 Developer is a [XXXXXXXXXXXXXXXXXX] duly organized and validly existing under the laws of [XXXXXXXXXXXXXXXXXX], has the requisite power and all required licenses to carry on its present and proposed activities, and has full power, right and authority to execute and deliver the Contract Documents and the Key Contracts to which Developer is a party and to perform each and all of the obligations of Developer provided for herein and therein. Developer is duly qualified to do business, and is in good standing, in the State, and will remain in good standing throughout the Term and for as long thereafter as any obligations remain outstanding under the Contract Documents.

17.1.11 The execution, delivery and performance of the Contract Documents and the Key Contracts to which Developer is (or will be) a party have been (or will be) duly authorized by all necessary corporate action of Developer; each person executing the Contract Documents and such Key Contracts on Developer's behalf has been (or at the time of execution will be) duly authorized to execute and deliver each such document on Developer's behalf; and the Contract Documents and such Key Contracts have been (or will be) duly executed and delivered by Developer.

17.1.12 Neither the execution and delivery by Developer of the Contract Documents and the Key Contracts to which Developer is (or will be) a party, nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict with or has resulted or will result in a default under or a violation of the governing instruments of Developer or any other agreements or instruments to which it is a party or by which it is bound.

17.1.13 The execution and delivery by Developer of the Contract Documents and Key Contract to which Developer is (or will be) a party, and the performance by Developer of its obligations thereunder, will not conflict with any Laws applicable to Developer that are valid and in effect on the date of execution and delivery.

17.1.14 Each of the Contract Documents and the Key Contracts to which Developer is (or will be) a party constitutes (or at the time of execution and delivery will constitute) the legal, valid and binding obligation of Developer, enforceable against Developer and, if applicable, each member of Developer, in accordance with its terms, subject only to applicable bankruptcy, insolvency and similar laws affecting the enforceability of the rights of creditors generally and the general principles of equity.

17.1.15 There is no action, suit, proceeding, investigation or litigation pending and served on Developer which challenges Developer's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents and the Key Contracts to which Developer is a party, or which challenges the authority of Developer's representative executing the Contract Documents or such Key Contracts; and Developer has disclosed to the Department any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which Developer is aware.

17.1.16 As of the Proposal Submission Date Developer disclosed to the Department in writing all organizational conflicts of interest of Developer and its Contractors of which Developer was actually aware; and between the Proposal Submission Date and the Effective Date Developer has not obtained knowledge of any additional organizational conflict of interest, and there have been no organizational changes to Developer or its Contractors identified in its Proposal, which have not been approved in writing by the Department. For this purpose, organizational conflict of interest has the meaning set forth in the Instructions to Proposers.

17.1.17 To the extent the Lead Contractor, the Lead Engineering Firm and/or the Lead Operations and Maintenance Firm is not Developer, Developer represents and warrants, as of the effective date of the relevant Key Contract, as follows: (a) each of the Lead Contractor, the Lead Engineering Firm and the Lead Operations and Maintenance Firm is duly organized, validly existing and in good standing under the laws of the state of its organization; and is duly qualified to do business, and is in good standing, in the State, (b) the capital stock of each of them (including options, warrants and other rights to acquire capital stock) is owned by the

Persons who Developer has set forth in a written certification delivered to the Department prior to the Effective Date; (c) each of them has the power and authority to do all acts and things and execute and deliver all other documents as are required to be done, observed or performed by it in connection with its engagement by Developer; (d) each of them has all necessary licenses from the State, expertise, qualifications, experience, competence, skills and know-how to perform the Design Work, Construction Work and the O&M Work, as applicable, of the Project in accordance with the Contract Documents; and (e) each of them is not in breach of any applicable Law that would have a material adverse effect on the Design Work, Construction Work and O&M Work, as applicable, of the Project.

17.1.18 Except as provided in Section 11.6, Developer has no authority or right to impose any fee, toll, charge or other amount for the use of the Project.

17.1.19 Prior to the Effective Date Developer made or caused to be made to the Department, in writing, all the disclosures required under Section 143(h)(5)(A) through (G), and as of the Effective Date all such disclosures remain true, complete and accurate.

17.2 Department Representations and Warranties

The Department hereby represents and warrants to Developer as follows:

17.2.1 The Department is a public agency, duly formed and validly existing under the laws of the State, and has full status, power, right and authority to execute, deliver and perform the Contract Documents to which the Department is (or will be) a party and to perform each and all of the obligations of the Department provided for herein and therein.

17.2.2 The Contract Documents to which the Department is (or will be) a party have each been duly authorized by the Department, and each constitutes (or at the time of execution and delivery will constitute) a legal, valid and binding obligation of the Department enforceable against the Department in accordance with its terms.

17.2.3 Each person executing the Contract Documents to which the Department is (or will be) a party has been (or at the time of execution will be) duly authorized to execute and deliver each such document on behalf of the Department; and the Contract Documents to which the Department is (or will be) a party have been (or will be) duly executed and delivered by the Department.

17.2.4 Neither the execution and delivery by the Department of the Contract Documents to which the Department is (or will be) a party nor the consummation of the transactions contemplated hereby or thereby, is (or at the time of execution will be) in conflict with or will result in a default under or violation of the Department's organizational documents or any other agreements or instruments to which it is a party or by which it is bound.

17.2.5 The execution and delivery by the Department of the Contract Documents to which the Department is (or will be) a party, and the performance by the Department of its obligations thereunder, will not conflict with any Laws applicable to the Department that are valid and in effect on the date of execution and delivery.

17.2.6 There is no action, suit, proceeding, investigation or litigation pending and served on the Department which challenges the Department's authority to execute, deliver or perform, or the validity or enforceability of, the Contract Documents to which the Department is a party,

or which challenges the authority of the Department official executing the Contract Documents to which the Department is a party; and the Department has disclosed to Developer any pending and un-served or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Department is aware.

17.2.7 In executing this Agreement, the Department is in full compliance, and shall remain in compliance, with Section 143, as Section 143 may be amended and with any successor thereto. As of the Effective Date, the Project is included in the Department's long-range transportation plan for the applicable metropolitan planning organization, and all Milestone Payments and Availability Payments, subject to appropriation, payable under this Agreement have been included in the proposed State Transportation Improvement Program Fund Estimate submitted to the California Transportation Commission for adoption.

17.3 Survival of Representations and Warranties

The representations and warranties of Developer and the Department contained herein shall survive expiration or earlier termination of this Agreement.

17.4 Special Remedies for Mutual Breach of Warranties

Notwithstanding any other provision of this Agreement, if there exists or occurs any circumstance or event that constitutes or results in a concurrent breach of any of the warranties set forth in this Article 17 by both Developer and the Department but does not also constitute or result in any other breach or default by either Party, then such breaches shall not form the basis for a Relief Event or damage claim by the Department against Developer. Instead, the only remedies shall be for the Parties to take action to rectify or mitigate the effects of such circumstance or event, to pursue severance and reformation of the Contract Documents as set forth in Section 26.12, or Termination by Court Ruling as set forth in Section 19.5.3.

ARTICLE 18 DEFAULT; SUSPENSION OF WORK

18.1 Default by Developer; Cure Periods

18.1.1 Developer Default

Developer shall be in breach of this Agreement upon the occurrence of any one or more of the following events or conditions (each a "**Developer Default**"):

18.1.1.1 Developer fails to satisfy the applicable conditions to commencement of the Design Work as set forth in Sections 4.6 within 90 days of the Effective Date;

18.1.1.2 Developer fails to begin the applicable portion of the Design Work within ten days following the Department's issuance of NTP 1;

18.1.1.3 Developer discontinues the prosecution of the Work for a consecutive period of 30 days, or fails to resume discontinued Work as required by the Contract Documents within 30 days after the Department notifies Developer to do so;

18.1.1.4 Developer fails to perform the Work with sufficient workmen and equipment or with sufficient materials to ensure prompt completion of the Work;

18.1.1.5 Developer fails to perform the Work or any portion thereof in accordance with the Contract Documents, including conforming to applicable requirements of the Technical Requirements; provided that a failure by Developer to perform any obligation for which Noncompliance Points are assigned under the then current Appendix 6 will not constitute a Developer Default under this Section 18.1.1.5;

18.1.1.6 Developer fails to comply with applicable Governmental Approvals and Laws, including the Federal Requirements;

18.1.1.7 Developer fails to make an undisputed payment to the Department under this Agreement when due, or fails to deposit funds to any reserve or account in the amount and within the time period required by this Agreement;

18.1.1.8 There occurs any use of the Project or a material portion thereof in violation of or not otherwise contemplated by this Agreement, the Technical Requirements, Governmental Approvals or Laws (except violations of Law by Users);

18.1.1.9 Developer fails to obtain, provide and maintain any insurance, bonds, guarantees, letters of credit or other performance or payment security as and when required under this Agreement for the benefit of relevant parties, or fails to comply with any requirement of this Agreement pertaining to the amount, qualifications, terms or coverage of the same;

18.1.1.10 Developer makes or attempts to make an assignment or transfer of all or any portion of this Agreement, the Lease, the Project or Developer's equity or economic interest therein in violation of Article 23 or there occurs an Equity Transfer or Change of Control in violation of Section 13.1;

18.1.1.11 Subject to Section 17.4, any representation or warranty made by Developer or any Guarantor in the Contract Documents, any guaranty or any certificate, schedule, report, instrument or other document delivered to the Department pursuant to the Contract Documents is false, misleading or inaccurate in any material respect when made or omits material information when made;

18.1.1.12 Developer fails to timely observe or perform or cause to be observed or performed any other material covenant, agreement, obligation, term or condition required to be observed or performed by Developer under the Contract Documents; provided that (a) such actions shall not be considered a Developer Default if they are the direct result of the Department's breach of its obligation to make payments to Developer and (b) a failure by Developer to perform any obligation for which Noncompliance Points are assigned under the then current Appendix 6 will not constitute a Developer Default under this Section 18.1.1.12;

18.1.1.13 Developer commences a voluntary case seeking liquidation, reorganization or other relief with respect to itself or its debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect, seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of it or any substantial part of its assets; becomes insolvent, or generally does not pay its debts as they become due or admits in writing its inability to pay its debts (other than: (i) debts otherwise paid by an Equity Member; or (ii) Project Debt that is otherwise paid by a financial guarantor that is a Lender to the holders thereof under its financial guaranty); makes an assignment for the benefit of creditors; or takes any action to authorize any of the foregoing; or any of the foregoing acts or events shall occur with respect to (a) any Equity Member with a material financial obligation

owing to Developer for Committed Investment, or (b) any Guarantor of material Developer obligations owed to the Department under the Contract Documents, provided such actions shall not be considered a Developer Default if they are the sole and direct result of the Department's breach of its obligation to make payments to Developer;

18.1.1.14 An involuntary case is commenced against Developer seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Developer or Developer's debts under any U.S. or foreign bankruptcy, insolvency or other similar Law now or hereafter in effect; seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official of Developer or any substantial part of Developer's assets; seeking the issuance of a writ of attachment, execution, or similar process; or seeking like relief, and such involuntary case shall not be contested by Developer in good faith or shall remain undismissed and unstayed for a period of 60 days; or any such involuntary case, or any of the foregoing acts or events, shall occur with respect to (a) any Equity Member with a material financial obligation owing to Developer for Committed Investment, or (b) any Guarantor of material Developer obligations owed to the Department under the Contract Documents; provided such actions shall not be considered a Developer Default if they are the sole and direct result of the Department's breach of its obligation to make payments to Developer;

18.1.1.15 Developer fails to comply with the Department's written suspension of Work order issued in accordance with Section 18.2.7 within the time reasonably allowed in such order;

18.1.1.16 Developer fails to: (a) achieve Financial Close by the Financial Close Deadline, unless such failure is excused pursuant to Section 15.2.7, (b) commence the Construction Work by the Construction Commencement Deadline, (c) achieve Substantial Completion by the Long Stop Date, or (d) achieve Final Acceptance by the Final Acceptance Deadline;

18.1.1.17 A Persistent Developer Noncompliance exists;

18.1.1.18 There occurs any Closure that is not a Permitted Construction Closure or a Permitted Closure; or

18.1.1.19 After exhaustion of all rights of appeal, there occurs any suspension, debarment, disqualification or removal (distinguished from ineligibility due to lack of financial qualifications), or there goes into effect an agreement for voluntary exclusion, from bidding, proposing or contracting with any federal, State or local department or agency of (a) Developer, (b) any Equity Member, (c) any Affiliate for whom transfer of ownership would constitute a Change of Control, or (d) any Key Contractor whose work is not completed.

18.1.2 Initial Notice and Cure Periods

For Developer breaches or failures listed as Noncompliance in Appendix 6, as it may be amended from time to time, the cure periods set forth therein shall exclusively govern for the sole purpose of assessing Noncompliance Points. Subject to remedies that this Article 18 expressly states may be exercised before lapse of a cure period, Developer shall have the following cure periods with respect to the following Developer Defaults:

18.1.2.1 For a Developer Default under Sections 18.1.1.1 through 18.1.1.3, Sections 18.1.1.6 through 18.1.1.10, Section 18.1.1.16(d), and Section 18.1.1.18 a period of 30 days after Developer receives written notice from the Department of Developer Default; provided that (a) as to a Developer Default under Section 18.1.1.8 or 18.1.1.18, such cure period shall not preclude or delay the Department's immediate exercise, without notice or demand, of its remedy set forth in Section 18.2.2, and (b) as to a Developer Default under Section 18.1.1.9 the Department shall have the right, but not the obligation, to effect cure, at Developer's expense, if the Developer Default continues beyond five days after such notice is delivered.

18.1.2.2 For a Developer Default under Sections 18.1.1.4, 18.1.1.5, 18.1.1.11, 18.1.1.12 and 18.1.1.19, a period of 30 days after Developer receives written notice from the Department of Developer Default; provided that (a) if the Developer Default is of such a nature that the cure cannot with diligence be completed within such time period and Developer has commenced meaningful steps to cure immediately after receiving the default notice, Developer shall have such additional period of time, up to a maximum cure period of 120 days, as is reasonably necessary to diligently effect cure, and (b) as to a Developer Default under Section 18.1.1.19, if the debarred or suspended Person is an Equity Member or Affiliate, cure will be regarded as complete when Developer proves it has removed such Person from any position or ability to manage, direct or control the decisions of Developer or to perform Work, and if the debarred or suspended Person is a Key Contractor cure will be regarded as complete when Developer replaces the Key Contractor with the Department's prior written approval as provided in Section 7.3.1.

18.1.2.3 For a Developer Default under Section 18.1.1.13 and 18.1.1.14, no right to notice or cure period, except that if the Developer Default relates to an Equity Member or a Guarantor, Developer shall have a period of 60 days to effect cure of such default by providing a substitute Equity Member or Guarantor reasonably acceptable to the Department or by providing a letter of credit or other form of security reasonably acceptable to the Department in the amount of, as the case may be, (a) the Equity Member's financial obligation for Committed Investment to or for the benefit of Developer, or (b) the Guarantor's specified sum or specified maximum liability under its guaranty, or if none is specified, the reasonably estimated maximum liability of the Guarantor. Notwithstanding the foregoing, if such default relates to an Equity Member who holds a Controlling Interest in Developer, Developer shall cure such default only by providing a letter of credit or other form of security reasonably acceptable to the Department in the amount of such Equity Member's financial obligation for Committed Investment to or for the benefit of Developer.

18.1.2.4 For a Developer Default under Sections 18.1.1.15, 18.1.1.16(a), (b) and (c), and 18.1.1.17, there is no cure period.

18.2 Department Remedies for Developer Default

18.2.1 Termination

In the event of a Developer Default under Section 18.1.1.16(a), the Department may terminate this Agreement as provided in Section 19.2.2. In the event of any Developer Default that is or becomes a Default Termination Event set forth in Section 19.4.1, the Department may terminate this Agreement as provided in Section 19.4.

18.2.2 Immediate Department Entry and Cure of Wrongful Use

Without notice and without awaiting lapse of the period to cure, in the event of any Developer Default under Section 18.1.1.8 (use of the Project in violation of the Contract Documents) or Section 18.1.1.18 (Closure that is not a Permitted Closure), the Department may enter and take control of the Project to restore the permitted uses and reopen and continue operations for the benefit of Developer and the public, until such time as Developer or the Lenders cure such breach, or the Department terminates this Agreement. Developer shall pay to the Department on demand the Department's Recoverable Costs in connection with such action. So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such a Developer Default, such action shall not be deemed unlawful or a breach of this Agreement, shall not expose the Department to any liability to Developer and shall not entitle Developer to any other remedy, except for the Department's gross negligence, recklessness, willful misconduct or bad faith, it being acknowledged that the Department has a high priority, paramount public interest in providing and maintaining the authorized uses of the Project and continuous public access to the Project. Immediately following cure of such Developer Default, as determined by the Department, acting reasonably, the Department shall relinquish control and possession of the Project back to Developer.

18.2.3 Remedies for Failure to Meet Safety Standards or Perform Safety Compliance

18.2.3.1 If at any time Developer, or its Surety under payment and performance bonds, fails to meet any Safety Standard or timely perform Safety Compliance or the Department and Developer cannot reach an agreement regarding the interpretation or application of a Safety Standard or the valid issuance of a Safety Compliance Order within a period of time acceptable to the Department, acting reasonably, the Department shall have the absolute right and entitlement to undertake or direct Developer to undertake any work required to ensure implementation of and compliance with Safety Standards as interpreted or applied by the Department or with the Safety Compliance Order.

18.2.3.2 To the extent that any work done pursuant to Section 18.2.3.1 is undertaken by the Department and is reasonably necessary to comply with Safety Standards or perform validly issued Safety Compliance Orders, Developer shall pay to the Department on demand the Department's Recoverable Costs in connection with such work, and the Department (whether it undertakes the work or has directed Developer to undertake the work) shall have no obligation or liability to compensate Developer for any Losses it suffers or incurs as a result thereof, except as a result of the Department's gross negligence, recklessness, willful misconduct or bad faith.

18.2.3.3 To the extent that any work done pursuant to Section 18.2.3.1 is undertaken by the Department and is not reasonably necessary to comply with Safety Standards or perform validly issued Safety Compliance Orders, the Department shall compensate Developer only for Losses it suffers or incurs as a direct result thereof.

18.2.3.4 Notwithstanding anything to the contrary contained in this Agreement, if, in the good faith judgment of the Department, Developer has failed to meet any Safety Standards or perform Safety Compliance and the failure results in an Emergency or danger to persons or property, and if Developer is not then diligently taking all necessary steps to

cure or deal with such Emergency or danger, the Department may (but is not obligated to), without notice and without awaiting lapse of the period to cure any breach, and in addition and without prejudice to its other remedies, (a) immediately take such action as may be reasonably necessary to rectify the Emergency or danger, in which event Developer shall pay to the Department on demand the cost of such action, including the Department's Recoverable Costs, or (b) suspend the Work and/or close or cause to be closed any and all portions of the Project affected by the Emergency or danger. So long as the Department undertakes such action in good faith, even if under a mistaken belief in the occurrence of such failure or existence of an Emergency or danger as a result thereof, such action shall not be deemed unlawful or a breach, shall not expose the Department to any liability to Developer, except if the Department's action constitutes gross negligence, recklessness, willful misconduct or bad faith, and shall not entitle Developer to any other remedy, it being acknowledged that the Department has a high priority, paramount public interest in protecting public and worker safety at the Project and adjacent and connecting areas. The Department's good faith determination of the existence of such a failure, Emergency or danger shall be deemed conclusive in the absence of clear and convincing evidence to the contrary. Immediately following rectification of such Emergency or danger, as determined by the Department, acting reasonably, the Department shall allow the Work to continue or such portions of the Project to reopen, as the case may be.

18.2.4 Department Step-in Rights

Upon the occurrence of a Developer Default and expiration, without full and complete cure, of the cure period, if any, available to Developer, without necessity for a Warning Notice and without waiving or releasing Developer from any obligations, but subject to the prior rights of the Lenders under this Agreement and the Direct Agreement, the Department shall have the right, but not the obligation, to pay and perform all or any portion of Developer's obligations and the Work that relates to Developer Default, as well as any other then-existing breaches or failures to perform for which Developer received prior written notice from the Department but has not commenced diligent efforts to cure, on and subject to the following terms and conditions.

18.2.4.1 The Department may, to the extent necessary to cure the Developer Default:

1. Perform or attempt to perform, or caused to be performed, such Work;
2. Employ security guards and other safeguards to protect the Project;
3. Spend such sums as the Department deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing the Work without obligation or liability to Developer or any Contractors for loss of opportunity to perform the same Work or supply the same materials and equipment;
4. Draw on and use proceeds from the Payment Security and Performance Security and any other available security to pay such sums;
5. Execute all applications, certificates and other documents as may be required for completing the Work;

6. Make decisions respecting, assume control over and continue Work as the Department determines appropriate;
7. Modify or terminate any contractual arrangements, without liability for termination fees, costs or other charges;
8. Meet with, coordinate with, direct and instruct Contractors, process invoices and applications for payment from Contractors, pay Contractors, and resolve claims of Contractors, and for this purpose Developer irrevocably appoints the Department as its attorney-in-fact with full power and authority to act for and bind Developer in its place and stead;
9. Take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and
10. Prosecute and defend any action or proceeding incident to the Work.

18.2.4.2 Developer shall reimburse the Department, on written demand, the Department's Recoverable Costs in connection with the performance of any act or Work authorized by this Section 18.2.4.

18.2.4.3 For the purpose of carrying out the Department's step-in rights under this Section 18.2.4, the Department shall have the right to take exclusive possession of the Project and the Project ROW and to suspend or revoke Developer's right to enter the same, and the Department is also hereby granted a perpetual, non-rescindable right of entry for the Department and its authorized representatives, contractors, subcontractors, vendors and employees to enter onto any other construction, lay down, staging, borrow and similar areas, exercisable at any time or times without notice. Neither the Department nor any of its authorized representatives, contractors, subcontractors, vendor and employees shall be liable to Developer in any manner for any inconvenience or disturbance arising out of any such exclusion of Developer from the Project or the Project Right of Way or its entry onto any construction lay down, staging, borrow and similar areas in order to perform under this Section 18.2.4, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such Person. If any Person exercises any right to pay or perform under this Section 18.2.4, it nevertheless shall have no liability to Developer for the sufficiency or adequacy of any such payment or performance, or for the manner or quality of design, construction, operation or maintenance, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such Person.

18.2.4.4 The Department's rights under this Section 18.2.4 are subject to the right of any Surety under payment and performance bonds to assume performance and completion of all bonded Work.

18.2.4.5 The Department's rights under this Section 18.2.4 are subject to the exercise of the cure rights by the Collateral Agent under the senior Security Documents, provided that (a) the Collateral Agent complies with its obligations under the Direct Agreement and (b) the Department may continue exercising its step-in rights until the Collateral Agent obtains possession and notifies the Department that the Collateral Agent stands ready to immediately commence good faith, diligent curative action.

18.2.4.6 Without waiving any of its rights and remedies under this Agreement, once the Department has exercised its rights under this Section 18.2.4, the Department will comply with the applicable provisions of the Direct Agreement after the Department has completed performance of the obligations or the work that was the responsibility of Developer to perform.

18.2.4.7 In the event the Department takes action described in this Section 18.2.4 and it is later finally determined that the Department lacked the right to do so because there did not occur a Developer Default and expiration, without full and complete cure, of the cure period, if any, available to Developer, then the Department's action shall be treated as a Department Change.

18.2.5 Damages; Offset

18.2.5.1 Subject to Section 18.2.13, the Department shall be entitled to recover any and all damages available under Law on account of the occurrence of the Developer Default, together with interest thereon from and after the date any amount becomes due to the Department until paid at the Late Payment Rate. Such damages may include (a) loss of any compensation due the Department under this Agreement proximately caused by the Developer Default, (b) actual and projected costs to remedy any defective part of the Work, (c) actual and projected costs to rectify any breach or failure to perform by Developer and/or bring the condition of the Project to the standard it would have been in if Developer had complied with its obligations to carry out and complete the Work in accordance with the Contract Documents, (d) actual and projected costs to the Department to terminate, take over the Project, re-procure and replace Developer, (e) actual and projected delay costs and (f) actual and projected increases in costs to the Department to complete the Project if not completed. Without limiting the foregoing, if the Developer Default is failure to achieve Final Acceptance by the Final Acceptance Deadline, the damages owing the Department shall include its premiums and loss allocations under the OCIP and other costs of administering the OCIP attributable to the period the Department elects to extend the OCIP beyond the Final Acceptance Deadline up to the Final Acceptance Date. Developer shall be liable for any damages that accrue after the occurrence of the Developer Default, regardless of whether the Developer Default is subsequently cured, which shall be due and owing after the expiration of all cure periods available to Developer and Lenders under the Contract Documents.

18.2.5.2 The Department may deduct and offset any damages owing to it under the Contract Documents from and against any amounts the Department may owe to Developer. Without limiting the foregoing, except for damages liquidated by the adjustments to Milestone Payments under Appendix 4-B, each Milestone Payment is subject to deduction and offset for the amount of any damages attributable to any Developer Default that concerns the D&C Work and is the subject of a notice delivered to Developer prior to the date for payment of the Milestone Payment.. If the amount of damages owing the Department is not liquidated or known with certainty at the time a payment is due from the Department to Developer, the Department may deduct and offset 105% of the amount it reasonably estimates will be due, subject to the Department's obligation to adjust such deduction or offset when the amount of damages owing the Department is liquidated or becomes known with certainty.

18.2.6 Persistent Developer Noncompliance

18.2.6.1 Developer recognizes and acknowledges that a pattern or practice of continuing, repeated or numerous instances of Noncompliance, whether such instances of

Noncompliance are cured or not, will undermine the confidence and trust essential to the success of the public-private arrangement under this Agreement and will have a material, cumulative adverse impact on the value of this Agreement to the Department. Developer acknowledges and agrees that measures for determining the existence of such a pattern or practice described in the definition of Persistent Developer Noncompliance and this Section 18.2.6 are a fair and appropriate objective basis to conclude that such a pattern or practice will continue.

18.2.6.2 A Persistent Developer Noncompliance under clause (a) of the definition thereof, regarding accumulated Noncompliance Points, shall be deemed to exist if:

1. The cumulative number of Noncompliance Points assessed during any consecutive [365]-day period (including any period prior to the Substantial Completion Date) equals or exceeds [100]; or
2. The cumulative number of Noncompliance Points assessed during any consecutive [1095]-day period (including any period prior to the Substantial Completion Date) equals or exceeds [200].

18.2.6.3 A Persistent Developer Noncompliance under clause (b) of the definition thereof shall be deemed to exist if:

1. The cumulative number of instances of Noncompliance, cured or uncured, during any consecutive [365]-day period equals or exceeds [100]; or
2. The cumulative number of instances of Noncompliance, cured or uncured, during any consecutive [1095]-day period equals or exceeds [250].

18.2.7 Suspension of Work

18.2.7.1 The Department shall have the right and authority, without obligation or liability, to suspend, in whole or in part, the Work by written order to Developer for Developer's failure to cure and correct, within the applicable cure period available to Developer (except as provided otherwise in clause 5 below) (if any), the following:

1. Failure to perform the Work in compliance with the Contract Documents;
2. Failure to comply with any Law or Governmental Approval (including failure to handle, preserve and protect archaeological, paleontological or historic resources, or failure to handle Hazardous Materials, in accordance with applicable Laws and Governmental Approvals);
3. Performance of Design Work or Construction Work without first satisfying all the conditions to commencement of Design Work or Construction Work, as applicable, set forth in Sections 4.6 and 4.7;
4. The existence of conditions unsafe for workers, other Project personnel or the general public, including failures to comply with Safety Standards or perform Safety Compliance as set forth in Section 18.2.3 (and in any such case the order of suspension may be issued without awaiting any cure period);

5. Failure to (a) provide proof of required insurance coverage as set forth in, and within the time required under clause 1 of, Section 16.1.2.4, without obligation to await lapse of the cure period set forth in Section 18.1.2.1, (b) provide proof of OCIP enrollment of Developer or any eligible Contractor before starting Work on the Site as required under Section 16.1.6.5, if such proof is not received within three Business Days after the Department or OCIP Administrator delivers to Developer written notice demanding enrollment, or (c) renew the Payment Security and Performance Security required under Section 16.2; and
6. Failure to carry out and comply with written orders given by the Department.

The Department shall have no liability to Developer, and Developer shall have no right to Extra Work Costs, Delay Costs, time, Financial Close Deadline or Completion Deadline extensions, compensation for losses due to delays in commencement of Availability Payments or for additional interest costs due to delayed receipt of a Milestone Payment, or other relief for the duration of any suspension under this Section 18.2.7.1.

18.2.7.2 The Department shall have the right and authority to suspend, in whole or in part, the Work for reasons other than set forth in Section 18.2.7.1. If the Department orders suspension of Work under this Section 18.2.7.2, it may constitute a Department-Caused Delay and Relief Event entitling Developer to submit a Claim for Extra Work Costs, Delay Costs, other compensation, Financial Close Deadline or Completion Deadline extensions and performance relief as permitted under Article 9.

18.2.7.3 For any suspension order issued under this Section 18.2.7, the Department will provide Developer the reason for such suspension, and Developer shall comply with such suspension order in accordance with [Section ___ of Division ___].

18.2.8 Warning Notices

18.2.8.1 Without prejudice to any other right or remedy available to the Department, the Department may deliver a written notice (a “**Warning Notice**”) to Developer, with a copy to the Collateral Agent, stating explicitly that it is a “Warning Notice” and stating in reasonable detail the matter or matters giving rise to the notice and, if applicable, amounts due from Developer, and reminding Developer of the implications of such notice, whenever there occurs a Developer Default.

18.2.8.2 The issuance of a Warning Notice may trigger a Default Termination Event as provided in Section 19.4.1.3.

18.2.8.3 The Department may issue a Warning Notice at the same time it delivers a notice of Developer Default, and a notice of Developer Default may be issued as a Warning Notice. In either such case, the cure period available to Developer, if any, shall be as set forth in Section 18.1.2. If the Department issues a Warning Notice for any Developer Default after it issues a notice of such Developer Default, then the remaining cure period available to Developer, if any, for such Developer Default before the Department may terminate this Agreement on account of such Developer Default shall be extended by the time period between the date the notice of such Developer Default was issued and the date the Warning Notice is issued. However, this shall not affect the time when the Department may exercise any other remedy respecting such Developer Default.

18.2.8.4 Along with the Warning Notice and without prejudice to any other right or remedy available to the Department, the Department may, but is not obligated to, request that Developer prepare and submit within the applicable cure period a remedial plan that shall set forth a schedule and specific actions to be taken by Developer to cure the Developer Default and reduce the likelihood of such defaults occurring in the future. Such actions may include improvements to Developer's quality management practices, plans and procedures, revising and restating management plans, changes in organizational and management structure, increased monitoring and inspections, changes in Key Personnel and other important personnel, and replacement of Contractors.

18.2.9 Payment and Performance Security

Upon the occurrence of a Developer Default and expiration, without full and complete cure, of the applicable cure period, if any, without necessity for a Warning Notice, and without waiving or releasing Developer from any obligations, and subject to Section 16.2.4 if applicable, the Department shall be entitled to make demand upon, draw on, enforce and collect any Payment Security or Performance Security available to the Department under this Agreement with respect to the Developer Default in question, in any order in the Department's sole discretion. Where access to the Payment Security or Performance Security is to satisfy damages owing, the Department shall be entitled to make demand, draw, enforce and collect regardless of whether the Developer Default is subsequently cured. The Department will apply the proceeds of any such action to the satisfaction of Developer's obligations under this Agreement, including payment of amounts due the Department.

18.2.10 Delay Liquidated Damages

18.2.10.1 Developer shall be liable for and pay to the Department liquidated damages with respect to any failure to achieve Final Acceptance by the Final Acceptance Deadline. Such liability shall apply even though a cure period remains available to Developer or any Lender under this Agreement or the Direct Agreement, or even though cure occurs.

18.2.10.2 The amount of such liquidated damages shall be [\$_____] per day for each day of delay in achieving Final Acceptance beyond the Final Acceptance Deadline. Such liquidated damages shall continue to accrue until the Final Acceptance Date or until termination of this Agreement. Such liquidated damages shall be an adjustment against the Maximum Availability Payments as provided in Appendix 7. Such liquidated damages shall constitute the Department's sole right to damages for such delay but do not liquidate other damages, including OCIP damages described in Section 18.2.5.1 and those encompassed by other adjustments to Maximum Availability Payments.

18.2.11 Other Rights and Remedies

18.2.11.1 In accordance with [Section ___ of Division ___], Developer shall be subject to suspension or revocation of its Certificate of Qualification for failure to timely perform and complete the Work by a Completion Deadline.

18.2.11.2 In the instance of a Developer Default, the Department expressly reserves any and all existing rights to pursue administrative or other remedies as to any entity's or Person's respective continuing or future fitness, eligibility, qualification, certification or responsibility status for participation in future Department contracts.

18.2.12 Cumulative, Non-Exclusive Remedies

Subject to Section 18.2.13, and except as specifically provided otherwise in this Agreement, each right and remedy of the Department hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein or now or hereafter existing under Law, and the exercise or beginning of the exercise by the Department of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by the Department of any or all other such rights or remedies.

18.2.13 Limitation on Developer's Liability for Certain Damages

18.2.13.1 Notwithstanding any other provision of the Contract Documents and except as set forth in Section 18.2.13.2, in no event shall Developer be liable to the Department for punitive damages or special, indirect or incidental consequential damages, whether arising out of breach of this Agreement, the Lease or any other Contract Document by Developer, tort (including negligence) or any other theory of liability, and the Department releases Developer from any such liability.

18.2.13.2 The foregoing limitation on Developer's liability shall not apply to or limit the Department's right of recovery respecting the following:

1. Losses (including defense costs) to the extent (a) covered by the proceeds of insurance required to be carried pursuant to Section 16.1, (b) covered by the proceeds of insurance actually carried by or insuring Developer under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 16.1, or (c) Developer is deemed to have self-insured the Loss pursuant to Section 16.1.4.3;
2. Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness, gross negligence or bad faith on the part of any Developer-Related Entity;
3. Losses arising out of Releases of Hazardous Materials by any Developer-Related Entity;
4. Amounts Developer may owe or be obligated to reimburse the Department under the express provisions of the Contract Documents, including Developer's liabilities for liquidated damages, Developer's indemnity and defense liabilities, and Developer's obligations for the Department's Recoverable Costs; and
5. Interest, late charges, fees, transaction fees and charges, penalties and similar charges that the Contract Documents expressly state are due from Developer to the Department.

18.3 Default by the Department; Cure Periods

18.3.1 Department Default

The Department shall be in breach of this Agreement upon the occurrence of any one or more of the following events or conditions (each a "**Department Default**"):

18.3.1.1 The Department fails to make any payment due Developer under this Agreement when due; provided that such payment is not subject to a Dispute;

18.3.1.2 Subject to Section 17.4, any representation or warranty made by the Department under Section 17.2 of this Agreement is false, misleading or inaccurate in any material respect when made or omits material information when made; or

18.3.1.3 The Department or any other Governmental Entity confiscates, sequesters, condemns or appropriates the Project or any material part thereof, or Developer's Interest or any material part thereof, excluding a Termination for Convenience or any other exercise of a right of termination set forth in this Agreement.

18.3.2 Cure Periods

The Department shall have the following cure periods with respect to the following Department Defaults:

18.3.2.1 For a Department Default under Sections 18.3.1.1, a period of [60] days after Developer delivers to the Department written notice of the Department Default.

18.3.2.2 For a Department Default under Sections 18.3.1.2 or 18.3.1.3, a period of [30] days after Developer delivers to the Department written notice of the Department Default; provided that if the Department Default is of such a nature that the cure cannot with diligence be completed within such time period and the Department has commenced meaningful steps to cure immediately after receiving the default notice, the Department shall have such additional period of time, up to a maximum cure period of [180] days, as is reasonably necessary to diligently effect cure.

18.4 Developer Remedies for Department Default

18.4.1 Termination

Subject to Section 18.4.3, Developer will have the right to terminate this Agreement and recover termination damages as more particularly set forth in, and subject to the terms and conditions of, Section 19.5.

18.4.2 Damages and Other Remedies

18.4.2.1 Developer shall have and may exercise the following remedies upon the occurrence of a Department Default and expiration, without cure, of the applicable cure period:

1. If Developer does not terminate this Agreement, then subject to Sections 9.2.1 and 18.4.3, Developer may submit a Claim for compensation, Financial Close Deadline or Completion Deadline extensions, performance relief and other relief permitted under Article 9; and
2. Subject to Sections 9.2.1, 18.4.3 and 19.11, Developer may exercise any other rights and remedies available under this Agreement or available at Law.

18.4.2.2 Subject to Section 18.4.3 and except as specifically provided

otherwise in this Agreement (including Sections 9.2.1 and 19.11), each right and remedy of Developer shall be cumulative and shall be in addition to every other right or remedy provided by this Agreement or now or hereafter existing under Law, and the exercise or beginning of the exercise by Developer of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by Developer of any or all other such rights or remedies.

18.4.3 Limitations on Remedies

18.4.3.1 Notwithstanding any other provision of the Contract Documents and except as provided in Section 18.4.3.2, in no event shall the Department be liable to Developer for punitive damages or special, indirect or incidental consequential damages, whether arising out of a breach of this Agreement, the Lease or any other Contract Document by the Department, tort (including negligence) or any other theory of liability, and Developer releases the Department from any such liability.

18.4.3.2 The foregoing limitation on the Department's liability for damages shall not apply to or limit Developer's right of recovery respecting the following:

1. Losses (including defense costs) to the extent covered by the proceeds of insurance or for which the Department has self-insured;
2. Losses arising out of fraud, criminal conduct, intentional misconduct, recklessness or bad faith on the part of the Department;
3. Losses arising out of Department Releases of Hazardous Materials;
4. Amounts the Department may owe or be obligated to reimburse to Developer under the express provisions of the Contract Documents; or
5. Interest, late charges, fees, transaction fees and charges, penalties and similar charges that the Contract Documents expressly state are due from the Department to Developer.

18.4.3.3 The measure of compensation available to Developer as set forth in this Agreement for an event of termination shall constitute the sole and exclusive monetary relief and damages available to Developer arising out of or relating to such event; and Developer irrevocably waives and releases any right to any other or additional damages or compensation. No award of compensation or damages shall be duplicative.

ARTICLE 19. TERMINATION

19.1 Termination for Convenience

19.1.1 The Department may terminate this Agreement and the Lease in whole if the Department determines, in its sole discretion, that a termination is in the Department's best interest (a "**Termination for Convenience**"). The Department will deliver to Developer a written Notice of Termination for Convenience specifying the election to terminate and its effective date. Termination of this Agreement and the Lease shall not relieve Developer or any Guarantor or Surety of its obligation for any claims arising from the Work performed prior to such termination.

19.1.2 In the event of a Termination for Convenience, the Department shall pay compensation to Developer (or to the Collateral Agent as provided in the Direct Agreement) in an amount equal to either (i) the Backward Looking Termination for Convenience Amount, or (ii) the Forward Looking Termination for Convenience Amount, as selected by Developer in Appendix 2-J. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.1.3 The Backward Looking Termination for Convenience Amount shall be calculated as follows (calculated at the Early Termination Date and without duplicative-counting):

1. The Project Debt Termination Amount; plus
2. An amount which, upon the date of payment by the Department, is added to all Distributions described in clause (a) of the definition thereof actually paid to Equity Members or their Affiliates on or before the date of payment by the Department, gives an internal rate of return up to the date of payment on Committed Investment described in clause (a) of the definition thereof (taking into account the timing of such Distributions and Committed Investment), equal to the Equity IRR; plus
3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus
4. Subject to Section 18.4.3, any Losses that have been incurred and will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided by Developer, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms, and (c) Developer and the relevant Contractors have each used reasonable efforts to mitigate the Losses;

Minus the sum of subsections (5) and (6) below

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date, except in the Handback Requirements Reserve Account (governed by Section 5.10.3.3); and
6. The portion accruing after the Early Termination Date of any previous payments to Developer that compensated Developer for Extra Work Costs and Delay Costs attributable to Relief Events that occurred prior to termination.

19.1.4 The Forward Looking Termination for Convenience Amount shall be calculated as follows (calculated at the Early Termination Date and without duplicative-counting):

1. The Project Debt Termination Amount; plus

2. The amount of all Distributions described in clause (a) of the definition thereof to Equity Members or their Affiliates anticipated in the Financial Model to be paid between the Early Termination Date until the date of expiration of the Term, each amount discounted back at the Equity IRR from the date on which it is shown to be payable in the Financial Model to the Early Termination Date; plus
3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus
4. Subject to Section 18.4.3, any Losses that have been incurred and will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided by Developer, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms, and (c) Developer and the relevant Contractors have each used its reasonable efforts to mitigate the Losses;

Minus the sum of subsections (5) and (6) below

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date, except in the Handback Requirements Reserve Account (governed by Section 5.10.3.3); and
6. The portion accruing after the Early Termination Date of any previous payments to Developer that compensated Developer for Extra Work Costs and Delay Costs attributable to Relief Events that occurred prior to termination.

19.2 Termination for Failure of Financial Close

19.2.1 Developer or the Department may terminate this Agreement without fault, Claim or penalty if Financial Close does not occur by the Financial Close Deadline and such failure is directly attributable to any of the contingencies set forth in Section 15.2.7; provided, however, notice of termination under this Section 19.2.1 shall obligate the Department and Developer to engage in good faith negotiations for a minimum period of 30 days before such termination is effective. Termination shall take effect at the end of such 30-day period unless the Parties otherwise agree in writing. In the event of such a termination, all the Contract Documents shall be deemed rescinded, and the Department shall promptly return to Developer the original of the Financial Close Security.

19.2.2 if Developer fails to achieve Financial Close by the Financial Close Deadline and such failure is not directly attributable to any of the contingencies set forth in Section 15.2.7, then the following terms and conditions shall apply.

19.2.2.1 The Department shall have the right to terminate this Agreement upon five days' prior written notice to Developer, without need for Warning Notice or any other notice and without any additional cure period, unless Developer achieves Financial Close in accordance with the conditions set forth in Section 15.2.7 within such five-day period.

19.2.2.2 In the event of such termination, Developer shall be liable for and pay to the Department liquidated damages for such failure in the amount of the Financial Close Security. Such liquidated damages shall constitute the Department's sole right to damages on account of such failure.

19.2.2.3 Upon or after the effective date of termination, the Department shall be entitled to collect the liquidated damages owing under Section 19.2.2 through a draw on or forfeiture of the Financial Close Security, as applicable, without prior notice to or demand upon Developer for such liquidated damages.

19.2.2.4 Developer acknowledges that the time period the Department has provided to Developer to achieve Financial Close is ample and reasonable, and that such liquidated damages are reasonable in order to compensate the Department for damages it will incur as a result of the lost opportunity to the Department represented by the Contract Documents. Such damages include the harm from the difficulty, and substantial additional expense, to the Department, to procure and deliver, operate and maintain the Project through other means, loss of or substantial delay in use, enjoyment and benefit of the Project by the general public, and injury to the credibility and reputation of the Department's transportation improvement program, with policy makers, other Governmental Entities and the general public who depend on and expect availability of service. Developer further acknowledges that these damages are incapable of accurate measurement because of, among other things, the unique nature of the Project and the unavailability of a substitute for it.

19.3 Termination for Extended Relief Events

19.3.1 Notice of Conditional Election to Terminate

Either Party may deliver to the other Party written notice of its conditional election to terminate this Agreement and the Lease based on Relief Events (other than a Department Default, which is governed by Section 19.5.1) if:

19.3.1.1 One or more of the following have occurred:

1. A Relief Event has occurred before the end of the Construction Period and the resulting Relief Event Delays exceed 270 days in the aggregate;
2. A Relief Event has occurred during the Operating Period and the period of time during which the Department is required to make payments as provided in Section 9.2.4 has expired; or
3. (a) A Relief Event has occurred, (b) the Department is not required to make a payment under Sections 9.2.2 or 9.2.4, as applicable, (c) the abovementioned notice is delivered after the Substantial Completion Date; (d) as a direct result of the Relief Event all or substantially all of the Segments have become and remain inoperable for a consecutive period of 270 days or more, and (e) such suspension of operations is not attributable to another

concurrent delay;

and

19.3.1.2 Developer could not have mitigated or cured such result through the exercise of diligent efforts; and

19.3.1.3 The written notice is delivered after such result has occurred, and such result is continuing at the time of delivery of the written notice; and

19.3.1.4 The written notice sets forth in reasonable detail the Relief Event, a description of the direct result and its duration, and the notifying Party's intent to terminate this Agreement.

19.3.1.5 Notwithstanding the foregoing, if following the occurrence of any Relief Event that results in damage or partial destruction of the Project:

1. The conditions listed in Sections 19.3.1.1 through 19.3.1.4 are satisfied;
2. Insurance proceeds are available to fund work required to remedy the effects of the Relief Event; and
3. The Parties agree to a restoration plan in respect of such work required to remedy the effect of the Relief Event;

then the Parties agree that neither of them shall have the right to elect to terminate this Agreement or the Lease pursuant to this Section 19.3.1.

19.3.2 Developer Options Upon Department Notice

If the Department gives written notice of conditional election to terminate, Developer shall have the option either (a) to accept such notice or (b) to continue this Agreement and the Lease in effect by delivering to the Department written notice of Developer's choice not later than [30] days after the Department delivers its notice. If Developer does not deliver such written notice within such [30]-day period, then it shall be conclusively deemed to have accepted the Department's election to terminate this Agreement and the Lease, whereupon termination shall take effect. If Developer delivers timely written notice choosing to continue this Agreement and the Lease in effect, then:

19.3.2.1 Except as provided in Article 9 and Article 10, the Department shall have no obligation to compensate Developer for any other costs of restoration and repair, for any loss of Availability Payments or for any other Extra Work Costs or Delay Costs arising out of the Relief Event;

19.3.2.2 If the Relief Event occurred prior to the Substantial Completion Date and resulted in a Relief Event Delay, Developer shall be entitled to an extension of the applicable Completion Deadlines in accordance with the Contract Documents; and

19.3.2.3 This Agreement and the Lease shall continue in full force and effect and the Department's election to terminate shall be deemed withdrawn.

19.3.3 Department Options Upon Developer Notice

If Developer gives written notice of conditional election to terminate, including an estimate (with supporting documentation) of the compensation that would be paid or reimbursed to Developer under Section 19.3.3.1, the Department shall have the option either: (a) to accept such notice, or (b) to continue this Agreement and the Lease in effect, provided that the Department in its reasonable discretion determines that the Project can be completed or re-opened, as applicable, on a commercially reasonable basis, in each case by delivering to Developer written notice of the Department's choice not later than [30] days after Developer delivers its notice. If the Department does not deliver such written notice within such [30]-day period, then it shall be conclusively deemed to have accepted Developer's election to terminate this Agreement and the Lease, whereupon termination shall take effect. If the Department delivers timely written notice choosing to continue this Agreement and the Lease in effect, then the following provisions shall apply.

19.3.3.1 The Department shall be obligated to pay or reimburse Developer an amount equal to (without duplicative-counting):

1. The Extra Work Costs to repair and restore any physical damage or destruction to the Project and Delay Costs, if any, directly caused by the Relief Event which are incurred after the date Developer delivers its written notice of conditional election to terminate; plus
2. Compensation calculated and paid in accordance with Section 9.2, modified as follows:
 - (a) If Developer delivers its written notice of conditional election to terminate prior to Substantial Completion, then: (i) the 270 day limitation in Section 9.2.2.4 shall not apply; and (ii) with respect to Relief Event Delays in excess of 270 days, then the amounts calculated under Sections 9.2.2.2.1(b)(i) and 9.2.2.2.1(b)(ii) shall be increased to include the prorated operation and maintenance expenses incurred on each such day, provided that Developer uses reasonable commercial efforts to mitigate such costs; or
 - (b) If Developer delivers its written notice of conditional election to terminate after Substantial Completion due to a Closure of one or more Segments caused by a Relief Event under clause (a) or (m) of the definition thereof, then beginning on the 271st day and continuing for as long as such Closure persists, an Hourly Unavailability Factor of [0.15] shall apply for purposes of calculating the Hourly Unavailability Adjustments for these Hours as described in Appendix 7, except that in no event shall such Hourly Unavailability Adjustments solely cause the prorated Availability Payments to fall below the lesser of: (i) the prorated amounts of debt service (except the repayment of principal scheduled to be funded by Milestone Payments which have been delayed by a Relief Event Delay) and operations and maintenance expenses scheduled to be paid as shown in the Financial Model for the time periods during which such Closure persists after the initial 270 days; or (ii) the actual prorated amounts of debt service (except the repayment of principal scheduled to be funded by Milestone Payments which have been delayed by a Relief

Event Delay) and operations and maintenance expenses incurred (provided that Developer uses reasonable commercial efforts to mitigate such costs) during the time period during which such Closure persists after the initial 270 days. Notwithstanding the foregoing, in no event shall the calculations in this clause (b) of Section 19.3.3.1.2 exceed the prorated Availability Payment which would have been earned if such Closure had not persisted for more than 270 days;

minus

3. The sum of (a) the greater of (i) the proceeds of insurance (including casualty insurance and business interruption insurance) that is required to be carried pursuant to Section 16.1 and provides coverage to pay, reimburse or provide for any of the foregoing costs and losses or (ii) the proceeds of insurance (including casualty insurance and business interruption insurance) that is actually carried by or insuring Developer under policies solely with respect to the Project and the Work, regardless of whether required to be carried pursuant to Section 16.1, and that provides coverage to pay, reimburse or provide for any of the foregoing costs and losses, and (b) the foregoing costs and losses that Developer is deemed to have self-insured pursuant to Section 16.1.4.3.

19.3.3.2 Developer's remedies and other relief from performance obligations under Section 9.2 shall continue to apply to the Relief Event until the damages produced by such Relief Event are compensated as provided in this Agreement and the restoration works are completed.

19.3.3.3 This Agreement and the Lease shall continue in full force and effect and Developer's election to terminate shall not take effect.

19.3.4 No Waiver

No election by Developer under Section 19.3.2 or by the Department under Section 19.3.3 to keep this Agreement and the Lease in effect shall prejudice or waive the Department's right to thereafter give a written notice of conditional election to terminate with respect to the same or any other Relief Event.

19.3.5 Concurrent Notices

If the Department and Developer deliver concurrent written notices of conditional election to terminate, Developer's notice shall prevail. Notices shall be deemed to be concurrent if each Party sends its written notice before actually receiving the written notice from the other Party. Knowledge of the other Party's written notice obtained prior to actual receipt of the notice shall have no effect on determining whether concurrent notice has occurred.

19.3.6 Termination Compensation for Extended Relief Events

If either Party accepts the other Party's conditional election to terminate, then this Agreement and the Lease shall be deemed terminated on an Early Termination Date that is [60] days after the date of acceptance of the conditional election to terminate; and Developer will be entitled to compensation calculated as follows (calculated at the Early Termination Date and

without double-counting):

1. The Project Debt Termination Amount; plus
2. Amounts paid by the Equity Members or their Affiliates in the form of Committed Investment described in clause (a) of the definition thereof up until the Early Termination Date, less any amounts actually received by the Equity Members or their Affiliates from Developer as Distributions described in clause (a) of the definition thereof, provided if the amounts calculated pursuant to this subsection (2) are less than zero, then, for purposes of the calculation of the termination amount, they shall be deemed to be zero; plus
3. Redundancy Payments for employees of Developer that have been or will be reasonably incurred by Developer as a direct result of termination of this Agreement; plus
4. Subject to Section 18.4.3, any Losses that have been or will be incurred by Developer as a direct result of termination of this Agreement arising out of the termination of contracts with Contractors, including reasonable and documented out-of-pocket costs to demobilize, but only to the extent that (a) such Losses are incurred in connection with the Project and in respect of the provision of services or the completion of work required to be provided, (b) such Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms and (c) Developer and the relevant Contractor have each used its reasonable efforts to mitigate the Losses;

Minus the sum of subsections (5) and (6) below

5. All amounts standing to the credit of any bank account held by or on behalf of Developer as of the Early Termination Date, except in the Handback Requirements Reserve Account (governed by Section 5.10.3.3); and
6. The portion accruing after the Early Termination Date of any previous payments to Developer that compensated Developer for Extra Work Costs and Delay Costs attributable to Relief Events that occurred prior to termination.

Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.4 Termination for Developer Default

19.4.1 Developer Defaults Triggering Department Termination Rights

Developer agrees, acknowledges and stipulates that any of the Developer Defaults listed in this Section 19.4.1 would result in material and substantial harm to the Department's rights and interests under this Agreement and therefore constitute a material Developer Default justifying termination if not cured within the applicable cure period, if any. After expiration of the applicable cure period (if any) provided to Developer under this Agreement, the following

Developer Defaults (each a “**Default Termination Event**”) shall, subject to the provisions of the Direct Agreement, entitle the Department, at its sole election, to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to Developer and the Collateral Agent under the Security Documents as required by the Direct Agreement:

19.4.1.1 There occurs a Developer Default under Section 18.1.1.13 or 18.1.1.14;

19.4.1.2 There occurs a Developer Default under Section 18.1.1.10, 18.1.1.15, 18.1.1.16(b), (c) or (d), or 18.1.1.17(a) or (b); or

19.4.1.3 There occurs any other Developer Default for which the Department issues a Warning Notice under Section 18.2.8 and such Developer Default is not fully and completely cured within the applicable cure period, if any, set forth in Section 18.1.2 or available to Lenders under the Direct Agreement.

19.4.2 Compensation to Developer

If the Department issues a notice of termination of this Agreement and the Lease due to a Default Termination Event, Developer will be entitled to compensation in the applicable amount set forth below.

19.4.2.1 If this Agreement and the Lease are terminated by the Department pursuant to Section 19.4.1 (but excluding a termination due to a Default Termination Event under Section 19.4.1.1) before the Substantial Completion Date, the Department shall pay compensation to Developer in an amount calculated as follows (calculated at the Early Termination Date and without duplicative-counting):

1. The lesser of (a) Project Adjusted Costs, or (b) the costs as shown in the Schedule of Values (as such Schedule of Values may be adjusted for Relief Events), corresponding to the percentage of such Work completed as of the Early Termination Date, less Milestone Payments actually paid by the Department, and excluding (i) interest and other financing costs, professional and advisory fees, and (ii) Developer overhead and administrative expenses; plus
2. The lesser of (a) the actual costs incurred in performing the O&M Work during the Construction Period, or (b) the O&M Work costs shown in the O&M Work budget for the Construction Period (as such O&M Work budget may be adjusted for Relief Events), corresponding to the percentage of the O&M Work completed as of the Early Termination Date, excluding from both items (a) and (b) the (i) interest and other financing costs, professional and advisory fees, (ii) Developer overhead and administrative expenses, and (iii) Redundancy Payments and other demobilization costs; plus
3. The amount of any compensation accrued under Section 9.2.3 but not yet paid;

minus the sum of subsections (4) and (5) below:

4. Subject to Section 18.2.13, the amount of any Losses recoverable by the

Department under the Contract Documents resulting from the Developer Default, including the damages described in Section 18.2.5.1; and

5. Any amounts previously paid (excluding Milestone Payments and Availability Payments) by the Department to Developer under the Agreement.

However, if the sum of subsections (1) and (2) above is more than [80% or less] of the Project Debt Termination Amount, Developer will be entitled to compensation of [80% or less] of the Project Debt Termination Amount minus the amount under subsections (5) above, except there shall not be subtracted the portion of previous payments by the Department to Developer that Developer applied to reduce the principal amount of the Project Debt.

19.4.2.2 If this Agreement and the Lease are terminated by the Department pursuant to Section 19.4.1 (but excluding a termination due to a Default Termination Event under Section 19.4.1.1) on or after the Substantial Completion Date, the Department shall pay compensation to Developer (calculated at the Early Termination Date and without duplicative-counting) equal to the lower of:

1. The amount calculated as follows:

- (a) The amount of the Project Adjusted Costs; minus
- (b) The value of the accrued amortization of the Project Adjusted Costs, provided that (i) accrued amortization will be determined by calculating, using a straight line amortization schedule, the total amount accrued through the Early Termination Date, and (ii) in no event shall such amount be greater than the amount of Project Adjusted Costs less accrued amortization on the Early Termination Date as shown in the Financial Model; minus
- (c) Subject to Section 18.2.13, the amount of any Losses recoverable by the Department under the Contract Documents resulting from the Developer Default, including the damages described in Section 18.2.5.1; minus
- (d) Any amounts previously paid (excluding Milestone Payments and Availability Payments) by the Department to Developer under the Agreement.; and [

2. The amount calculated as follows:

- (a) [80% or less] of the Project Debt Termination Amount; minus
- (b) Any amounts previously paid (excluding Milestone Payments and Availability Payments) by the Department to Developer under the Agreement, except there shall not be subtracted the portion of previous payments by the Department to Developer that Developer applied to reduce the principal amount of the Project Debt.

19.4.2.3 If this Agreement and the Lease are terminated due to a Default Termination Event under Section 19.4.1.1 where the debtor is Developer, no compensation shall be due to Developer.

19.4.3 Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.4.4 If this Agreement and the Lease are terminated for grounds which are later determined not to justify a termination by the Department pursuant to Section 19.4.1, such termination shall be deemed to constitute a termination for convenience pursuant to Section 19.1.1, and Developer's remedy shall be as set forth in Section 19.1.2.

19.5 Termination for Department Default or Suspension of Work; Termination by Court Ruling

19.5.1 Termination for Department Default

19.5.1.1 In the event of a material Department Default under Section 18.3.1.1 or 18.3.1.3 that remains uncured following notice and expiration of the applicable cure period under Section 18.3.2, Developer shall have the right to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to the Department.

19.5.1.2 In the event of such termination, the Department shall pay compensation to Developer in an amount equal to the amount described in Section 19.1.2. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures. If, however, it is determined after Developer terminates this Agreement that Developer lacked the right to terminate due to material Department Default, then such termination shall be treated as a termination due to material Developer Default and Section 19.4.2 shall govern the measure of the Termination Compensation.

19.5.2 Termination for Suspension of Work

If the Department issues a suspension order under Section 18.2.7.2 that suspends all or any material portion of the Work on all or any material portion of the Project for a period of [270] days or more, Developer shall have the right to terminate this Agreement and the Lease, effective immediately upon delivery of written notice of termination to the Department, provided that such suspension is not the result of the negligence, willful misconduct, or breach of applicable Law, Governmental Approval or contract by any Developer-Related Entity. In the event of such termination, Developer will be entitled to compensation equal to the amount described in Section 19.1.2. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.5.3 Termination by Court Ruling

Termination by Court Ruling means, and becomes effective upon, (a) issuance of a final order by a court of competent jurisdiction to the effect that this Agreement is void, voidable, and/or unenforceable or impossible to perform in its entirety for reasons beyond the reasonable control of Developer, or (b) issuance of a final order by a court of competent jurisdiction upholding the binding effect on Developer of a Change in Law that causes impossibility of performance of a fundamental obligation by Developer or the Department under the Contract

Documents or impossibility of exercising a fundamental right of Developer or the Department under the Contract Documents. The final court order shall be treated as the notice of termination of this Agreement and the Lease. In the event of such termination, Developer will be entitled to compensation in an amount equal to the amount described in Section 19.3.6. Any Dispute arising out of the determination of such compensation shall be resolved according to the Dispute Resolution Procedures.

19.6 Termination Procedures and Duties

Upon expiration of the Term or any earlier termination of this Agreement for any reason, the provisions of this Section 19.6 shall apply. Except as expressly provided otherwise in this Section 19.6, Developer shall timely comply with such provisions independently of, and without regard to, the timing for determining, adjusting, settling and paying any amounts due Developer or the Department on account of termination. If Developer fails to timely comply with the provisions of this Section 19.6, Department shall have the right thereupon to enter and take possession and control of the Project and Project Right of Way by summary proceeding available to landlords under applicable Law.

19.6.1 Transition Plan

19.6.1.1 Not later than [90] days prior to expiration of the Term, or, if applicable, within [three] days after receipt of a notice of termination, Developer shall meet and confer with the Department for the purpose of developing an interim transition plan for the orderly transition of Work, demobilization and transfer of control of the Project and Project Right of Way to the Department. The Parties shall use diligent efforts to complete preparation of the interim transition plan within [15] days after the date Developer receives the notice of termination.

19.6.1.2 The Parties shall use diligent efforts to complete a final transition plan within [30] days after such date. The transition plan shall be in form and substance reasonably acceptable to the Department and shall include and be consistent with the other provisions and procedures set forth in this Section 19.6, all of which procedures Developer shall immediately follow, regardless of any delay in preparation or acceptance of the interim or final transition plan. The transition plan shall include an estimate of costs and expenses to be incurred by both Parties in connection with implementation of the transition plan.

19.6.2 Relinquishment and Possession of the Project

19.6.2.1 On the Termination Date, Developer shall: (a) execute, acknowledge and deliver to the Department a quitclaim deed, in form and substance acceptable to the Department, acting reasonably, quitclaiming all of Developer's right, title, interest and estate in and to the Project and Project Right of Way, (b) execute and deliver a written termination of the Lease, and (c) cancel the Lease Escrow Agreement and return all originals of the Lease to Department if the Lease Escrow Agreement is still in effect on the Termination Date.

19.6.2.2 On the Termination Date, or as soon thereafter as is possible as provided in the transition plan, Developer shall relinquish and surrender full control and possession of the Project and Project Right of Way to the Department or the Department's Authorized Representative, and shall cause all Persons claiming under or through Developer to do likewise, in at least the condition required by the Handback Requirements.

19.6.2.3 On the later of the Termination Date or the date Developer relinquishes full control and possession as provided in the transition plan, the Department shall assume responsibility, at its expense (subject to the right to recover damages under this Agreement), for the Project and the Project Right of Way.

19.6.3 Continuance or Termination of Key Contracts Prior to Work Completion

19.6.3.1 If as of the Termination Date Developer has not completed the Work, in whole or in part, the Department shall elect, by written notice to Developer, to continue in effect the relevant Key Contracts or to require their termination. The Department may elect to keep certain Key Contracts in effect and require termination of other Key Contracts. If the Department elects to continue any Key Contracts, then Developer shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all Developer's right, title and interest in and to such Key Contracts, and the Department shall assume in writing Developer's obligations thereunder that arise from and after the Termination Date.

19.6.3.2 If the Department elects to require termination of any Key Contracts, then Developer shall:

1. Unless the Department has entered into a new concession agreement with a Lender or its Substituted Entity, take such steps as are necessary to terminate the relevant Key Contracts, including notifying each Key Contractor that its Key Contract is being terminated and that each of them is to immediately stop work and stop and cancel orders for materials, services or facilities unless otherwise authorized in writing by the Department;
2. Immediately demobilize and secure in a safe manner Staging Areas and any other staging, lay down and storage areas used by such Key Contractors for the Project to the reasonable satisfaction of the Department, and remove all debris and waste materials (including Hazardous Materials and Undesirable Materials that are in the process of removal) except as otherwise approved by the Department in writing;
3. Take such other actions as are necessary or appropriate to mitigate further cost;
4. Subject to the Department's reasonable prior written approval, settle all outstanding liabilities and all claims arising out of such Key Contracts;
5. As a condition to Developer receiving all payments required to be paid by the Department under Article 19 and pursuant to the requirements of the transition plan, cause each of the Key Contractors to execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all of their right, title and interest in and to all warranties, to the extent assignable, claims and causes of action held by each of them against subcontractors and other third parties in connection with the Project or the Work, to the extent the Project or the Work is adversely affected by any subcontractor or other third-party breach of warranty, contract or other legal obligation; and

6. As a condition to Developer receiving all payments required to be paid by the Department under Article 19 and pursuant to the requirements of the transition plan, carry out such other directions as the Department may give for termination of the Work in accordance with the transition plan.

19.6.4 Other Close-Out Activities

19.6.4.1 Within [30] days after notice of termination is delivered or no later than [30] days prior to the natural expiration of the Term (as applicable), Developer shall provide the Department with a true and complete list of all materials, goods, machinery, equipment, parts, supplies and other property in inventory or storage (whether held by Developer or any Person on behalf of or for the account of Developer) for use in or respecting the Work or the Project, or on order or previously completed but not yet delivered from Suppliers for use in or respecting the Work or the Project. On or about the Termination Date, Developer shall transfer to the Department title to , all such materials, goods, machinery, equipment, parts, supplies and other property through bills of sale or other documents of title as directed by the Department, and deliver possession of all such items to the Department or the Department's Authorized Representative.

19.6.4.2 Developer shall take all action that may be necessary, or that the Department may direct, for the protection and preservation of the Project, the Work and such materials, goods, machinery, equipment, parts, supplies and other property.

19.6.4.3 On the Termination Date, Developer shall transfer to the Department the amount in the Handback Requirements Reserve Account due the Department in accordance with Section 5.10.3.3.

19.6.4.4 On or about the Termination Date, Developer shall execute and deliver to the Department the following, together with an executed bill of sale or other written instrument, in form and substance acceptable to the Department, acting reasonably, assigning and transferring to the Department the following:

1. All completed or partially completed drawings (including plans, elevations, sections, details and diagrams), specifications, designs, Design Documents, As-Built Record Plans, surveys, and other documents and information pertaining to the Work;
2. All samples, borings, boring logs, subsurface data and similar data and information relating to the Project or Project Right of Way;
3. All books, records, reports, test reports, studies and other documents of a similar nature relating to the Work, the Project or the Project Right of Way;
4. All data and information relating to the use of the Project by the traveling public, including all studies, reports, projections, estimates and other market research or analysis relating to use of the Project by the traveling public; and
5. All other work product and Intellectual Property used or as specifically developed by Developer or any Affiliate relating to the Work, the Project or the Project Right of Way, except for Proprietary Intellectual Property of Developer or an Affiliate held in an Intellectual Property Escrow.

19.6.4.5 Within [90] days after the Termination Date, the Parties shall adjust and prorate costs of operation and maintenance of the Project, including utility service costs and deposits, as of the Termination Date. If the Parties do not have complete or accurate information by such date, they shall make the adjustment and proration using a good faith estimate, and thereafter promptly readjust when the complete and accurate information is obtained. The Parties acknowledge that certain adjustments or readjustments may depend on receipt of bills, invoices or other information from a third party, and that the third party may delay in providing such information. Any readjustment necessary only because of error in calculation and not due to lack of complete and accurate information shall be irrevocably waived, unless the Party seeking readjustment delivers written request for such readjustment to the other Party not later than [180] days following the Termination Date.

19.6.4.6 On or about the Termination Date, Developer shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all Developer's right, title and interest in and to any escrows or similar arrangements for the protection of Intellectual Property, source code or source code documentation of others (to the extent permitted by such third parties) used for or relating to the Project or the Work.

19.6.4.7 On or about the Termination Date, Developer shall execute and deliver to the Department a written assignment, in form and substance acceptable to the Department, acting reasonably, of all Developer's right, title and interest in and to all warranties, to the extent assignable, claims and causes of action held by Developer against third parties in connection with the Project or the Work which are not to be pursued by Developer as provided in the final transition plan, including claims under casualty and business interruption insurance.

19.6.4.8 Developer shall otherwise assist the Department in such manner as the Department may require prior to and for a reasonable period following the Termination Date to ensure the orderly transition of the Project, and shall, if appropriate and if requested by the Department, take all steps as may be necessary to enforce the provisions of the Key Contracts pertaining to the surrender of the Project.

19.7 No Separate Terminations of Agreement and Lease

If for any reason this Agreement is terminated before the Lease is delivered from escrow, then all right to obtain the Lease shall concurrently cease and terminate. Department and Developer further agree and expressly intend that after the Lease is granted neither this Agreement nor the Lease shall continue in full force and effect without the other. Accordingly, (a) any termination of this Agreement according to its terms shall also automatically constitute a termination of the Lease, even if the notice of termination fails to declare a termination of the Lease, and (b) any termination of the Lease shall also automatically constitute a termination of this Agreement, even if the notice of termination fails to declare a termination of this Agreement.

19.8 Effect of Expiration or Earlier Termination

19.8.1 Cessation of Developer's Property Interest

19.8.1.1 Expiration of the Term shall automatically cause, as of the expiration date, the complete reversion to the Department, and cessation, of the Developer's Interest, at no charge to the Department, but subject to Section 19.6.4.5 and without prejudice

to any Claim of liability pursuant to Section 19.8.3.

19.8.1.2 Early termination of this Agreement and the Lease shall automatically cause, as of the Termination Date, the complete reversion to the Department, and cessation, of the Developer's Interest, except for its right to Termination Compensation.

19.8.1.3 Automatically upon either such reversion and cessation of Developer's Interest, the Project and the Project Right of Way shall be and remain free and clear of any lien, encumbrance or other claim of record created, permitted or suffered by Developer or anyone claiming by, through or under Developer, including the liens, pledges, assignments, collateral assignments, security interests and encumbrances of any and all Financing Documents. In order to confirm the foregoing, at the Department's request, Developer shall promptly obtain and deliver to the Department reconveyances, releases and discharges of all Security Documents, executed by the Lenders in proper form for recording or filing (as appropriate), but no such reconveyances, releases and discharges shall be necessary to the effectiveness of the foregoing.

19.8.2 Contracts and Agreements

Regardless of the Department's prior actual or constructive knowledge thereof, no contract or agreement to which Developer is a party as of the Termination Date shall bind the Department, unless the Department elects to assume such contract or agreement in writing. Except in the case of the Department's express written assumption, no such contract or agreement shall entitle the contracting party to continue performance of work or services respecting the Project following Developer's relinquishment to the Department of possession and control of the Project, or to any claim, legal or equitable, against the Department.

19.8.3 Liability After Expiration or Termination

No expiration or earlier termination of this Agreement or the Lease shall excuse either Party from any liability arising out of any default as provided in this Agreement or the Lease that occurred prior to termination. Notwithstanding the foregoing, any termination of this Agreement shall automatically extinguish any Claim of Developer to compensation for Extra Work Costs and Delay Costs accruing after the Early Termination Date attributable to Relief Events that occurred prior to termination.

19.8.4 Final Release

19.8.5 Subject to Sections 19.6.4.5 and 19.8.3, upon expiration of the Term, the Department shall be forever released and discharged from any and all Claims, causes of action, suits, demands and Losses, known or unknown, suspected or unsuspected, that Developer may have against the Department arising out of or relating to this Agreement or the Lease or expiration thereof, the other Contract Documents, or the Project. Developer shall execute and deliver to the Department all such releases and discharges as the Department may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing release.

19.8.6 Subject to Sections 19.6.4.5 and 19.8.3, if this Agreement is earlier terminated for any reason, then the Department's payment to Developer of the amounts required under this Agreement (if any) shall constitute full and final satisfaction of, and upon payment the Department shall be forever released and discharged from, any and all claims, causes of action, suits,

demands and Losses, known or unknown, suspected or unsuspected, that Developer may have against the Department arising out of or relating to this Agreement or the Lease or termination thereof, the other Contract Documents, or the Project. Upon such payment, Developer shall execute and deliver to the Department all such releases and discharges as the Department may reasonably require to confirm the foregoing, but no such written release and discharge shall be necessary to give effect to the foregoing satisfaction and release.

19.9 Payment of Termination Compensation

19.9.1 Termination Compensation for termination pursuant to Section 16.2.1.12 shall be due and payable by the Department in immediately available funds within [90] days after (a) the Department gives its written notice of its election to terminate; (b) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount, with documentation reasonably required by the Department to support such statement; and (c) Developer provides the Department with a written statement as to the amounts payable and deductible pursuant to subsections (2) through (6) of Section 19.3.6, with documentation reasonably required by the Department to support such statement and a certification that such amounts are true and correct.

19.9.2 Termination Compensation for termination pursuant to Section 19.1, 19.5.1 or 19.5.2 shall be due and payable by the Department in immediately available funds within [90] days after (a) the Department or Developer, as the case may be, gives its written notice of its election to terminate; (b) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount (if applicable), with documentation reasonably required by the Department to support such statement; and (c) Developer provides the Department with a written statement as to the amounts payable and deductible pursuant to subsections (2) through (6) of Sections 19.1.3 or 19.1.4, as applicable, with documentation reasonably required by the Department to support such statement and a certification that such amounts are true and correct.

19.9.3 Termination Compensation for termination pursuant to Section 19.3 shall be due and payable by the Department in immediately available funds within [90] days after (a) either Party has accepted the other Party's election to terminate this Agreement, (b) the time period for the other Party to elect not to terminate this Agreement has expired and the party has not made the election; (c) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount, with documentation reasonably required by the Department to support such statement; and (d) Developer provides the Department with a written statement as to the amounts payable and deductible pursuant to subsections (2) through (6) of Section 19.3.6, with documentation reasonably required by the Department sufficient to support such statement and a certification that such amounts are true and correct.

19.9.4 Termination Compensation for termination pursuant to Section 19.4 shall be due and payable by the Department in immediately available funds within [90] days after (a) the Department has given written notice of its election to terminate this Agreement, (b) Developer provides the Department with a written statement as to the amounts described in subsections (1) through (3) of Section 19.4.2.1 or subsection (1) of Section 19.4.2.2, as the case may be, with written documentation sufficient to support such statement and a certification that such amounts are true and correct.

19.9.5 Termination Compensation for termination pursuant to Section 19.5.3 shall be due and payable by the Department in immediately available funds within [90] days after (a) the

Termination by Court Ruling becomes effective, (b) the Collateral Agent provides the Department with a written statement as to the Project Debt Termination Amount, with documentation reasonably required by the Department to support such statement; and (c) Developer provides the Department with a written statement as to the amounts payable and deductible pursuant to subsections (2) through (6) of Section 19.3.6, with documentation reasonably required by the Department sufficient to support such statement and a certification that such amounts are true and correct.

19.9.6 If as of the date the Department tenders payment the Parties have not agreed upon the amount of Termination Compensation due, then:

1. The Department shall proceed to make payment to Developer of the undisputed portion of the Termination Compensation;
2. Within [30] days after receiving such payment Developer shall deliver to the Department written notice of the additional amount of Termination Compensation that Developer in good faith determines is still owing (the "disputed portion"); and
3. The Department shall pay the disputed portion of the Termination Compensation to Developer in immediately available funds within [30] days after the disputed portion is agreed to by the Parties or otherwise determined pursuant to Article 24, as the case may be, and shall pay interest thereon commencing [30] Days after the Early Termination Date until paid at the Late Payment Rate.

19.9.7 If the Department does not pay the undisputed portion, or the finally determined amount of the disputed portion, of the Termination Compensation on the date due, whether due to lack of appropriations, lack of available funds or other reason, then it shall thereafter continue to pay to Developer [85%] of the Quarterly Payments that would have been due absent termination until such portion of the Termination Compensation, together with interest thereon at the Late Payment Rate, is paid in full. Such Quarterly Payments shall be credited toward the Termination Compensation.

19.10 Exclusive Termination Rights

This Article 19 together with Sections 16.1.2.12, 18.2.1 and 18.4.1 and the express provisions on termination set forth in the Lease contain the entire and exclusive provisions and rights of the Department and Developer regarding termination of this Agreement and the Lease, and any and all other rights to terminate under Law are hereby waived to the maximum extent permitted by Law.

ARTICLE 20. RESERVED RIGHTS

20.1 General

Without prejudice to Developer's rights to additional compensation, Financial Close Deadline or Completion Deadline extensions, performance relief and other relief permitted under Article 9, Developer's rights and interests in the Project and Project Right of Way are and shall remain specifically limited only to such real and personal property rights and interests that

are necessary and required for developing, permitting, designing, financing, constructing, installing, equipping, operating, maintaining, repairing, reconstructing, rehabilitating, restoring, renewing or replacing the Project. Developer's rights and interests specifically exclude any and all Airspace and any and all improvements and personal property above, on or below the surface of the Project Right of Way which are not necessary and required for such purposes.

20.2 Reserved Business Opportunities

20.2.1 The Department reserves to itself, and Developer hereby relinquishes, all right and opportunity to develop and pursue anywhere in the world entrepreneurial, commercial and business activities that are ancillary or collateral to the use, enjoyment and operation of the Project and Project Right of Way as provided in this Agreement and the Lease ("**Business Opportunities**"). Unless expressly authorized by the Department in its sole discretion, Developer will not grant permission for any Person to use or occupy the Project for any ancillary or collateral purpose, whether through a sublease or otherwise. The foregoing reservation in no way precludes Developer or its Affiliates and Contractors from (a) carrying out its financial plan reflected in its Financial Model, (b) arranging and consummating Refinancings, (c) creating and using brochures and other marketing material that include descriptions, presentations and images of the Project or the Work for the purpose of promoting Developer's business of developing, financing and operating transportation projects, or (d) competing on any request or solicitation for proposals or bids issued by the Department in connection with Business Opportunities.

20.2.2 The Business Opportunities reserved to the Department include all the following:

20.2.2.1 All rights to finance, design, construct, operate and maintain any transit, passenger or freight rail facility or other mode of transportation in the Airspace or Project Right of Way, and to grant to others such rights;

20.2.2.2 All rights to finance, design, construct, operate and maintain Project Enhancements in the Airspace or Project Right of Way, and to grant others such rights;

20.2.2.3 Unless Developer has exercised its right under Section 11.6 to collect tolls and user fees for the right to use the Project and satisfied all conditions precedent under Section 11.6, all rights to toll, collect tolls and perform other tolling activities in the Airspace or Project Right of Way, and to grant to others such rights;

20.2.2.4 All rights to install, use, lease, grant indefeasible rights of use, sell and derive revenues from electrical and fiber optic conduit, cable, capacity and associated equipment or other telecommunications equipment and capacity, existing over, on, under or adjacent to any portion of the Project Right of Way, except for the capacity of any such improvement installed by Developer that is necessary for and devoted exclusively to the operation of the Project;

20.2.2.5 All rights to use, sell and derive revenues from traffic data and other data generated from the operation of the Project;

20.2.2.6 All ownership, possession and control of, and all rights to develop, use, operate, lease, sell and derive revenues from, the Airspace or Project Right of Way, including development and operation of service areas, rest areas and any other office, retail,

commercial, industrial or mixed use real estate project within the Airspace or Project Right of Way;

20.2.2.7 All ownership, possession and control of, and all rights to develop, use, lease, sell and derive revenues from, carbon credits or other environmental benefits generated by or arising out of the development, use, operation or maintenance of the Project;

20.2.2.8 All rights to install, use and derive information, services, capabilities and revenues from intelligent transportation systems and applications, except installation and use of any such systems and applications by Developer as required solely for operation of the Project. For avoidance of doubt, if Developer installs any such systems or applications, all use and capacity thereof not necessary for operation of the Project is reserved to, and shall be the sole property of, the Department;

20.2.2.9 All rights to market, distribute, sell and derive revenues from any goods, products or merchandise depicting, utilizing or exploiting any name, image, logo, caricature or other representation, in any form or medium, of the Department or the Project;

20.2.2.10 All rights and opportunities to grant to others sponsorship, advertising and naming rights with respect to the Project or any portion thereof, provided that in any sponsorship or naming rights transaction the Department shall cause to be granted to Developer a non-exclusive license to use the name in connection with Project operations; and

20.2.2.11 Any other commercial or noncommercial development or use of the Airspace or Project Right of Way for other than operation of the Project.

20.2.3 If the development, use or operation of the Airspace or Project Right of Way by the Department or anyone claiming under or through the Department, or if the development or operation of a Business Opportunity in the Airspace or Project Right of Way, materially prevents Developer from performing its fundamental obligations under this Agreement or materially adversely affects its costs, Developer shall be entitled to submit a Claim for compensation, Completion Deadline extensions, performance relief or other relief as permitted under Article 9. Prior to deciding whether to pursue or implement a Business Opportunity, the Department may require Developer to provide analysis of the impacts thereof on Developer's costs and schedule.

20.2.4 Developer may propose Business Opportunities, including expected financial and other terms, for Department consideration. In the event Developer desires to utilize, develop or take advantage of any Business Opportunity, it may submit to the Department its ideas and proposals for development thereof. If and only if the Department, in its sole discretion, is interested in the proposed Business Opportunity, the Department and Developer shall thereafter negotiate cooperatively and in good faith to formulate a structure, terms and conditions and written agreement(s) for such Business Opportunity and its use and development, which may include a development agreement, concession or franchise agreement, license agreement, royalty agreement, joint venture, or other form of lawful joint enterprise or lawful joint participation concerning the Business Opportunity. Nothing herein, however, creates any legally binding obligation on the part of the Department or Developer to continue such negotiations or to enter into any structure or agreement for development or use of a Business Opportunity. Neither the submission to the Department of a proposed Business Opportunity or related ideas, concepts, financial models or other information, nor the Department's election not to engage in the proposed Business Opportunity with Developer, shall preclude the Department from thereafter pursuing such Business Opportunity or using, adapting and disclosing the ideas,

concepts, financial models or other information presented, provided the Department pursues it through a competitive procurement process in which Developer is afforded a fair and non-discriminatory opportunity to compete.

20.2.5 In the event a Developer Default concerns a breach of the provisions of this Section 20.2, in addition to any other remedies, the Department shall be entitled to Developer's disgorgement of all profits from the prohibited activity, together with interest thereon at the maximum rate permitted by Law, and to sole title to and ownership of the prohibited assets and improvements and revenues derived therefrom.

20.2.6 For the avoidance of doubt, Developer is prohibited by Law and this Article 20 from placing or permitting any outdoor advertising within the boundaries of the Project Right of Way.

ARTICLE 21. RECORDS; INTELLECTUAL PROPERTY

21.1 Maintenance and Inspection of Records

21.1.1 Developer shall keep and maintain in **[INSERT LOCATION]** or other location approved by the Department in writing in its sole discretion all books, records and documents relating to the Project, Project Right of Way, or Work, including copies of all original documents delivered to the Department. Developer shall keep and maintain such books, records and documents in accordance with applicable provisions of the Contract Documents and in accordance with Best Management Practice. Developer shall notify the Department where such records and documents are kept.

21.1.2 Developer shall make all its books, records and documents available for inspection by the Department and the Department's Authorized Representatives and legal counsel at Developer's offices in **[INSERT LOCATION]** or other location approved by the Department in writing in its sole discretion, , or pursuant to each Intellectual Property Escrow, at all times during normal business hours, without charge. Developer shall provide, or make available for review pursuant to each Intellectual Property Escrow, to the Department copies thereof as and when reasonably requested by the Department, without charge. The Department may conduct any such inspection upon 48 hours' prior written notice, or unannounced and without prior notice where there is good faith suspicion of fraud or criminal activity. The right of inspection includes the right to make extracts and take notes.

21.1.3 Developer shall retain records and documents for a minimum of five years after the date the record or document is generated; provided that if the Contract Documents specify any different time period for retention of particular records, such time period shall control. Notwithstanding the foregoing, all records which relate to Claims and Disputes being processed or actions brought under the Dispute Resolution Procedures shall be retained and made available until any later date that such Claims, Disputes and actions are finally resolved.

21.2 Audits

21.2.1 The Department shall have such rights to review and audit Developer, its Contractors and their respective books and records as the Department deems necessary for purposes of verifying compliance with the Contract Documents and applicable Law. Without limiting the foregoing, the Department shall have the right to audit Developer's Project

Management Plan and compliance therewith, including the right to inspect Work and/or activities and to verify the accuracy and adequacy of the Project Management Plan and its component parts, plans and other documentation.

21.2.2 All Claims filed against the Department shall be subject to audit at any time following the filing of the Claim. The audit may be performed by employees of the Department or by an auditor under contract with the Department. No notice is required before commencing any audit before 60 days after the expiration of the term of this Agreement. Thereafter, the Department shall provide 20 days notice to Developer, any Contractors or their respective agents before commencing an audit. Developer, Contractors or their agents shall provide adequate facilities, acceptable to the Department, for the audit during normal business hours. Developer, Contractors and their agents shall cooperate with the auditors. Failure of Developer, Contractors or their agents to maintain and retain sufficient books and records to allow the auditors to verify all or a portion of the Claim or to permit the auditor access to such books and records shall constitute a waiver of the Claim and shall bar any recovery thereunder. At a minimum, the auditors shall have available to them the following documents relating to the Claim:

- 21.2.2.1** Daily time sheets and supervisor's daily reports;
- 21.2.2.2** Union agreements;
- 21.2.2.3** Insurance, welfare, and benefits records;
- 21.2.2.4** Payroll registers;
- 21.2.2.5** Earnings records;
- 21.2.2.6** Payroll tax forms;
- 21.2.2.7** Material invoices and requisitions;
- 21.2.2.8** Material cost distribution work sheet;
- 21.2.2.9** Equipment records (list of company equipment, rates, etc.);
- 21.2.2.10** Contractors' (including Suppliers') invoices;
- 21.2.2.11** Contractors' and agents' payment certificates;
- 21.2.2.12** Canceled checks (payroll and Suppliers);
- 21.2.2.13** Job cost report;
- 21.2.2.14** Job payroll ledger;
- 21.2.2.15** General ledger;
- 21.2.2.16** Cash disbursements journal;

21.2.2.17 All documents that relate to each and every Claim together with all documents that support the amount of damages as to each Claim; and

21.2.2.18 Work sheets used to prepare the Claim establishing (a) the cost components of the Claim, including labor, benefits and insurance, materials, equipment, Contractors, all documents that establish the time periods, individuals involved, the hours for the individuals, and the rates for the individuals, and (b) the lost revenue components of the Claim.

21.2.3 Full compliance by Developer with the provisions of this Section 21.2 is a contractual condition precedent to Developer's right to seek relief on a Claim under this Agreement.

21.2.4 Any rights of the federal government and any agency thereof, including FHWA, to review and audit Developer, its Contractors and their respective books and records are set forth in the Federal Requirements and applicable Law.

21.2.5 The Department's audit rights include the right to observe the business operations of Developer and its Contractors to confirm the accuracy of books and records and compliance with the Project Management Plan.

21.2.6 Developer shall include in the Project Management Plan internal procedures to facilitate review and audit by the Department and, if applicable, FHWA.

21.2.7 Developer represents and warrants the completeness and accuracy of all information it or its agents provides in connection with Department audits, and shall cause all Contractors to warrant the completeness and accuracy of all information such Contractors provide in connection with Department audits.

21.2.8 Developer's internal and third-party quality and compliance auditing responsibilities shall be set forth in the Project Management Plan.

21.2.9 Nothing in the Contract Documents shall in any way limit the constitutional and statutory powers, duties and rights of elected State officials, including the independent rights of the State Auditor, in carrying out his or her legal authority.

21.3 Public Records Act

21.3.1 Developer shall comply with the Public Record Act and the Department's guidelines established pursuant to California Government Code Section 6253.4 dealing with access to public records. Further, Developer acknowledges and agrees that, except as provided by applicable Law, all Submittals, records, documents, drawings, plans, specifications and other materials in the Department's possession, including materials submitted by Developer, are subject to the provisions of the Public Records Act. If Developer believes information or materials submitted to the Department constitute trade secrets, proprietary information or other information exempt from disclosure, Developer shall be solely responsible for specifically and conspicuously designating that information by placing "CONFIDENTIAL" in the center header of each such page affected, as it determines to be appropriate and placing the materials in a folder or binder clearly labeled with the citation to the specific Law that exempts the material from disclosure under the Public Records Act. Any specific proprietary information, trade secrets or confidential commercial and financial information shall be clearly identified as such, and shall be accompanied by a concise statement of reasons supporting the claim including the specific Law that authorizes the confidentiality and the specific Law that exempts the material from disclosure under the Public Records Act. Nothing contained in this

provision shall modify or amend requirements and obligations imposed on the Department by the Public Records Act or other applicable Law, and the provisions of the Public Records Act or other Laws shall control in the event of a conflict between the procedures described above and the applicable Law. Developer is advised to contact legal counsel concerning such Law and its application to Developer.

21.3.2 If the Department receives a request for public disclosure of materials marked "CONFIDENTIAL," the Department will use reasonable efforts to notify Developer of the request and give Developer an opportunity to assert, in writing and at its sole expense, a claimed exception under the Public Records Act or other applicable Law within the time period specified in the notice issued by the Department and allowed under the Public Records Act. Under no circumstances, however, will the Department be responsible or liable to Developer or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Law, or court order, or occurs through inadvertence, mistake or negligence on the part of the Department or its officers, employees, contractors or consultants.

21.3.3 If any legal action is filed against the Department to enforce the provisions of the Public Records Act in relation to confidential information, the Department agrees to promptly notify Developer of such action, and the Department's sole involvement in such proceedings or litigation will be as the custodian retaining the material until otherwise ordered by a court or such other authority having jurisdiction with respect thereto, and Developer shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk; provided, however, that the Department reserves the right, in its sole discretion, to intervene or participate in the litigation in such manner as it deems necessary or desirable. Developer shall pay and reimburse the Department within [30] days after receipt of written demand and reasonable supporting documentation for all costs and fees, including attorneys' fees and costs, the Department incurs in connection with any litigation, proceeding or request for disclosure.

21.4 Intellectual Property

21.4.1 Subject to Section 21.5, Developer shall deliver copies of all Proprietary Intellectual Property owned by Developer which it uses in providing the Work to the Department. All Intellectual Property contained in the Work, including Proprietary Intellectual Property and Technology Enhancements, owned by Developer or its Affiliates or Contractors on the Effective Date or developed by Developer or its Affiliates or Contractors during the Term shall remain exclusively the property of Developer or its Affiliates or Contractors that supply the same, notwithstanding any delivery of copies thereof to the Department or any other provision contained in this Agreement.

21.4.2 The Department shall have and is hereby granted a nonexclusive, transferable, irrevocable, fully paid up right and license to use, reproduce, modify, adapt and disclose, and sublicense others to use, reproduce, modify, adapt and disclose, the Proprietary Intellectual Property owned by Developer or its Affiliates or Contractors, including with respect to Technology Enhancements, source code and source code documentation, solely in connection with the Project and any highway or other road owned and operated by the Department or a State or regional Governmental Entity; provided that the Department shall have the right to exercise such license only at the following times:

21.4.2.1 From and after the expiration or earlier termination of the Term for any reason whatsoever;

21.4.2.2 During any time that the Department is exercising its step-in rights pursuant to Section 18.2.4, in which case the Department may exercise such license only in connection with the Project; and

21.4.2.3 During any time that Developer has been replaced, in which case the Department may exercise such license only in connection with the Project.

21.4.3 The Department shall have no right to sell any Proprietary Intellectual Property of Developer or to use, reproduce, modify, adapt and disclose, or allow any party to use, reproduce, modify, adapt and disclose, any such Proprietary Intellectual Property for any other purpose other than as set forth in Section 21.4.2.

21.4.4 The right to transfer the license is limited to any Governmental Entity that succeeds to the power and authority of the Department generally or with respect to the Project.

21.4.5 The right to sublicense is limited to State or regional Governmental Entities that own or operate a highway or other road and to the concessionaires, contractors, subcontractors, employees, attorneys, consultants and agents that are retained by or on behalf of the Department or any such State or regional Governmental Entity in connection with the Project or another highway or other road. All such sublicenses shall be subject to Section 21.4.6.

21.4.6 Subject to Section 21.3, the Department shall:

21.4.6.1 Not disclose any Proprietary Intellectual Property of Developer to any Person other than authorized transferees and sublicensees who agree to be bound by any confidentiality obligations of the Department relating thereto;

21.4.6.2 Enter into a commercially reasonable confidentiality agreement if requested by Developer with respect to the licensed Proprietary Intellectual Property; and

21.4.6.3 Include, or where applicable require such other State or regional Governmental Entity to include, in the contract with the sublicensee its covenant to employ sound business practices no less diligent than those used for its own confidential information, and no less diligent than required by commercially reasonable standards of confidentiality, to protect all Proprietary Intellectual Property of Developer and other materials provided under the sublicense against disclosure to third parties not in receipt of a sublicense, and to use the sublicense only for the permitted purposes.

21.4.7 Notwithstanding any contrary provision of this Agreement, in no event shall the Department or any of its directors, officers, employees, consultants or agents be liable to Developer, any Affiliate or any Contractor for any damages, including loss of profit, arising out of breach of the duty of confidentiality set forth in Section 21.4.6 if such breach is not the result of gross negligence or intentional misconduct. Developer hereby irrevocably waives all claims to any such damages.

21.4.8 Developer shall continue to have a full and complete right to use any and all duplicates or other originals of its Proprietary Intellectual Property in any manner it chooses.

21.4.9 With respect to any Proprietary Intellectual Property, including with respect to Technology Enhancements, source code and source code documentation owned by a Person other than Developer, including any Affiliate, Developer shall obtain from such owner,

concurrently with execution of any contract, subcontract or purchase order with such owner or with the first use or adaptation of the Proprietary Intellectual Property in connection with the Project, both for Developer and the Department, nonexclusive, transferable, irrevocable, royalty-free licenses to use, reproduce, modify, adapt and disclose such Proprietary Intellectual Property solely in connection with the Project and any highway, or other road owned and operated by the Department or a State or regional Governmental Entity, of at least identical scope, purpose, duration and applicability as the license granted under Section 21.4.2. The limitations on sale, transfer, sublicensing and disclosure by the Department set forth in Section 21.4.3 through Section 21.4.6 shall also apply to the Department's licenses in relation to such Proprietary Intellectual Property. Developer shall also either cause to be delivered to the Department copies of such Proprietary Intellectual Property or obtain from such owner consent to have the relevant Proprietary Intellectual Property deposited into an Intellectual Property Escrow pursuant to the provisions of Section 21.5. The foregoing requirements shall not apply, however, to mass-marketed software products (sometimes referred to as "shrink wrap software") owned by such a Person where such a license and copies cannot be extended to the Department using commercially reasonable efforts.

21.4.10 All Background Intellectual Property shall be owned by Developer or its Affiliates or Contractors, as applicable. The Department shall have and is hereby granted a non-exclusive license to use the Background Intellectual Property owned by Developer or its Affiliates or Contractors, but only in connection with the Project and such license shall only be provided during the Term.

21.5 Intellectual Property Escrows

21.5.1 The Department and Developer acknowledge that Developer and/or Contractors that supply software, software source code or source code documentation may not wish to deliver this Proprietary Intellectual Property as specifically required by Section 21.4.1 directly to the Department, as public disclosure could deprive Developer and/or Contractors of commercial value. Developer further acknowledges that the Department nevertheless must be ensured access to such Proprietary Intellectual Property at any time, and must be assured that such Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 is released and delivered to the Department in either of the following circumstances:

21.5.1.1 In the case of such Proprietary Intellectual Property owned by Developer or any Affiliate, (a) this Agreement is terminated for Developer Default, (b) a business failure (including voluntary or involuntary bankruptcy or insolvency) of Developer occurs, (c) Developer is dissolved or liquidated, or (d) Developer fails or ceases to provide services as necessary to permit continued use of such Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 pursuant to the license or any sublicense thereof.

21.5.1.2 In the case of such Proprietary Intellectual Property owned by a Contractor (other than a Contractor that is an Affiliate), this Agreement is terminated for any reason (including Department Default) and either (a) a business failure (including voluntary or involuntary bankruptcy) of the Contractor occurs or (b) the Contractor is dissolved or liquidated or otherwise ceases to engage in the ordinary course of the business of manufacturing, supplying, maintaining and servicing such Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 that is the subject of a license under Section 21.4.

21.5.2 In lieu of delivering such Proprietary Intellectual Property directly to the

Department as required in Section 21.4.1, Developer may, from time to time, elect to deposit it with a neutral depository. In such event, the Department and Developer shall: (a) mutually select one or more escrow companies or other neutral depositories (each an "**Escrow Agent**") engaged in the business of receiving and maintaining escrows of software source code and situated in a convenient location; (b) establish one or more escrows (each an "**Intellectual Property Escrow**") with the Escrow Agent **on terms and conditions reasonably acceptable to the Department and Developer** for the deposit, retention, upkeep and release of source code and/or other Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 and related documentation; (c) determine a date for Developer's deposit of the Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1 into the Intellectual Property Escrow; and (d) determine a process for releasing from escrow the Proprietary Intellectual Property to be delivered to the Department pursuant to Section 21.4.1. Provisions for access and release to the Department shall be consistent with Section 21.5.1. Related documentation shall include all relevant commentary, explanations and instructions to compile source code, and all modifications, additions or substitutions made to such source code and related documentation. Intellectual Property Escrows also may include Affiliates and Contractors as parties and may include deposit of their Proprietary Intellectual Property. The Department shall not be responsible for the fees and costs of the Escrow Agent.

21.5.3 If the Department elects, in its sole discretion, not to be a signatory party to the escrow agreement establishing an Intellectual Property Escrow, then the Department shall be a named, intended third party beneficiary of the escrow agreement and the subject Intellectual Property Escrow with direct rights of enforcement against Developer and the Escrow Agent. Each escrow agreement shall provide that neither Developer nor the Escrow Agent shall have any right to amend or supplement it, or waive any provision thereof, without the Department's prior written approval in its sole discretion.

21.5.4 Intellectual Property Escrows shall provide rights of access and inspection to the Department and its designees at any time, subject to terms and conditions reasonably necessary to protect the confidentiality and proprietary nature of the contents of the Intellectual Property Escrows.

21.5.5 The Intellectual Property Escrows shall survive expiration or earlier termination of this Agreement regardless of the reason.

21.6 Escrow of Financial Modeling Data

21.6.1 [To come]

21.7 Information Disclosure

Developer shall promptly provide to the California Transportation Commission or the State Legislative Analyst any information or data either of them may request that is in the possession of or reasonably available to any Developer-Related Entity concerning the Project or the Work. The California Transportation Commission and State Legislative Analyst are intended third party beneficiaries of this Section 21.6 with direct rights of enforcement.

ARTICLE 22. FEDERAL REQUIREMENTS

22.1 Compliance with Federal Requirements

Developer shall comply and require its Contractors to comply with all Federal Requirements, including those set forth in Appendix 20 to this Agreement and including compliance with federal Law pertaining to the use of federal-aid funds.

22.2 Cooperation with FHWA

Developer shall cooperate with FHWA in the reasonable exercise of FHWA's duties and responsibilities in connection with the Project.

ARTICLE 23. ASSIGNMENT AND TRANSFER

23.1 Restrictions on Assignment, Subletting and Other Transfers

23.1.1 Developer shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber Developer's Interest or any portion thereof without the Department's prior written approval, except:

23.1.1.1 To Lenders for security as permitted by this Agreement, provided Developer retains responsibility for the performance of Developer's obligations under the Contract Documents;

23.1.1.2 To any Lender affiliate that is a Substituted Entity in accordance with Section 12.5.2 or to any other Substituted Entity approved by the Department; provided that such Substituted Entity assumes in writing full responsibility for performance of the obligations of Developer under this Agreement, the Lease, the other Contract Documents and the Key Contracts to which Developer is then a party arising from and after the date of assignment; or

23.1.1.3 To any entity in which the organizations signing this Agreement for Developer, or the shareholder(s), general partner(s) or member(s) that exercise management control over such organizations, hold and exercise effective management control and hold at least the applicable percent of equity interest set forth in Section 13.1.

23.1.2 Developer shall not sublease or grant any other special occupancy or use of the Project to any other Person without the Department's prior written approval in its sole discretion.

23.1.3 Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use in violation of this provision shall be null and void *ab initio* and the Department, at its option, may declare any such attempted action to be a material Developer Default. The foregoing shall not prejudice Developer's right to cure a Developer Default under Section 18.1.2.1.

23.2 Standards and Procedures for Department Approval

23.2.1 Where the Department's prior approval is required for a proposed sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use (collectively an "assignment"), and such assignment is proposed at

any time during the period ending [six] years after the Substantial Completion Date, the Department may withhold or condition its approval in its sole discretion. Any such decision of the Department to withhold approval shall be final, binding and not subject to the Dispute Resolution Procedures.

23.2.2 Thereafter, the Department shall not unreasonably withhold its approval. Among other reasonable factors and considerations, it shall be reasonable for the Department to withhold its approval if:

23.2.2.1 Developer fails to demonstrate to the Department's reasonable satisfaction that the proposed assignee, sublessee, grantee or transferee (collectively the "transferee"), and its proposed contractors (a) have the financial resources, qualifications and experience to timely perform Developer's obligations under the Contract Documents and Key Contracts and (b) are in compliance with the Department's rules, regulations and adopted written policies regarding organizational conflicts of interest;

23.2.2.2 Less than all of Developer's Interest is proposed to be assigned, conveyed, transferred, pledged, mortgaged, encumbered, sublet or granted; or

23.2.2.3 At the time of the proposed assignment, there exists any uncured Developer Default or any event or circumstance that with the lapse of time, the giving of notice or both would constitute a Developer Default, unless the Department receives from the proposed transferee assurances of cure and performance acceptable to the Department in its good faith discretion.

23.2.3 In order to request the Department's approval of a proposed assignment, Developer shall deliver to the Department a Submittal consisting of a request for approval together with (a) a reasonably detailed description of the proposed assignment, (b) such information, evidence and supporting documentation as the Department may request concerning the identity, financial resources, qualifications, experience and potential conflicts of interest of the proposed transferee and its proposed contractors and (c) such evidence of organization and authority, and such incumbency certificates, certificates regarding debarment or suspension, and other certificates, representations and warranties as the Department may request. For proposed assignments governed by Section 23.2.2, the Department will evaluate the identity, financial resources, qualifications, experience and potential conflicts of interest using the same standards and criteria that it is then currently applying, or if there is no current application, then the same standards and criteria it most recently applied, to the evaluation of Persons responding to the Department requests for qualifications for concession or similar agreements for comparable projects and facilities.

23.2.4 If for any reason the Department does not act within 30 days after receiving all required information, or any extension thereof by mutual agreement of the Parties, the proposed assignment shall not be permitted, subject to Developer's right, in the case of a proposed assignment governed by Section 23.2.2, to submit a Dispute for resolution according to the Dispute Resolution Procedures.

23.3 Assignment by the Department

The Department may assign all or any portion of its rights, title and interests in and to the Contract Documents, Payment Security and Performance Security, guarantees, letters of credit and other security for payment or performance: (a) without Developer's consent, to any other

Person that succeeds to the governmental powers and authority of the Department, and (b) to others with the prior written consent of Developer, Developer shall provide such consent if [Issue: Should consent be necessary for an assignment under clause (a)? This would occur via legislation reorganizing the Department, and a contract cannot interfere with such reorganization. Also, under clause (a) it would be legislation where the new agency succeeds to the Department's powers and authority, so that the sources and amounts of funding would be those that the Department had.] either (a) the sources of funding of the Department's assignee for Milestone Payments and Availability Payments are at least as adequate and secure as the Department's at the time of the assignment or (b) the Department's assignee shall have a credit rating equal to or better than the Department's rating at the time of the assignment as measured by a nationally recognized rating agency. Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance or grant of other special occupancy or use in violation of this provision shall be null and void *ab initio*.

23.4 Notice and Assumption

23.4.1 Assignments and transfers of Developer's Interest or the Department's interest permitted under this Article 23 or otherwise approved in writing by the Department or Developer, as applicable, shall be effective only upon receipt by the non-assigning Party of written notice of the assignment or transfer and a written instrument executed by the transferee, in form and substance reasonably acceptable to the non-assigning Party, in which the transferee, without condition or reservation, assumes all of Developer's or the Department's (as the case may be) obligations, duties and liabilities under this Agreement, the Lease and the other Contract Documents then in effect and agrees to perform and observe all provisions thereof applicable to Developer or the Department.

23.4.2 Each transferee of Developer's Interests, including any Person who acquires Developer's Interest pursuant to foreclosure, transfer in lieu of foreclosure or similar proceeding, shall take Developer's Interest subject to, and shall be bound by, the Project Management Plan, the Quality Plan, the Key Contracts, the Utility Agreements, the Governmental Approvals, and all agreements between the transferor and Governmental Entities with jurisdiction over the Project or the Work, except to the extent otherwise approved by the Department in writing in its good faith discretion. Except with respect to assignments and transfers in lieu of foreclosure or similar proceeding, the transferor and transferee respecting an assignment of Developer's Interest shall give the Department written notice of the assignment not less than [30] days prior to the effective date thereof.

23.5 Change of Organization or Name

23.5.1 Developer shall not change the legal form of its organization without the prior written approval of the Department, which consent may be granted or withheld in the Department's sole discretion.

23.5.2 If either Party changes its name, such Party agrees to promptly furnish the other Party with written notice of change of name and appropriate supporting documentation.

ARTICLE 24. DISPUTE RESOLUTION PROCEDURES

[Note: This Article will be substantially revised based on decisions to be made regarding dispute resolution procedures.]

24.1 General

The Parties agree to use reasonable efforts to resolve any Disputes under this Article 24 as quickly as possible, taking into consideration the time required to prepare detailed documentation.

24.2 Disputes Review Board

24.2.1 Except as provided under Section 24.4, the following Disputes shall be submitted to the Disputes Review Board in accordance with this Section 24.2: (a) Disputes arising up to and relating to Final Acceptance, and (b) Disputes relating to latent defects arising after Final Acceptance related to Work performed prior to Final Acceptance. Appendix 10-B establishes the authority and administrative procedures related to the submission of such Disputes to the Disputes Review Board. The Parties may agree to omit any of the steps or shorten the time periods in this Section 24.2 in order to hasten resolution.

1. If Developer objects to any Department decision, action or order, Developer may file a written protest with the Department, stating clearly and in detail the basis for the objection, within [15] days after the relevant decision, action or order.
2. The Department will consider the written protest and make its decision on the basis of the relevant Contract Document, together with the facts and circumstances involved in the Dispute. The Department's decision will be furnished in writing to Developer within [15] days after receipt of the written protest.
3. Developer will have [7] days from the date it receives the Department's written decision to submit a written rebuttal to the Department's decision.
4. The Department will review Developer's rebuttal and issue a final written decision to Developer within [10] days after receipt of the rebuttal.
5. The Department's written decision in response to Developer's rebuttal is final and conclusive on the subject, unless Developer reserves the Dispute by filing a written appeal with the Department within [10] days of receiving the final decision. If Developer files such an appeal with the Department, either the Department or Developer may refer the matter to the Disputes Review Board.
6. Upon receipt by the Disputes Review Board of the Dispute from either Party, the Disputes Review Board will decide when to conduct the hearing, provided that the Disputes Review Board shall hold the hearing within [20] days of receipt, unless the Parties mutually agree to a longer time period.
7. Either Party may furnish written evidence or documentation to the Disputes Review Board regarding the Dispute. If either Party furnishes such information to the Disputes Review Board, it will furnish copies of such information to the other Party a minimum of [10] days prior to the date the Disputes Review Board sets to convene the hearing for the

Dispute. If the Disputes Review Board requests any additional documentation or evidence prior to, during, or after the hearing, the relevant Party will provide the requested information to the Disputes Review Board and to the other Party, in accordance with the deadlines set by the Disputes Review Board.

8. Developer and the Department will each be afforded an opportunity to be heard by the Disputes Review Board and to offer evidence. Neither the Department nor Developer may present information at the hearing that was not previously distributed to both the Disputes Review Board and the other Party.
9. The Disputes Review Board's recommendations for resolution of the Dispute will be given in writing to both the Department and Developer within [15] days of completion of the hearings. In cases of extreme complexity, both Parties may agree to allow additional time for the Disputes Review Board to formulate its recommendations.
10. Within [15] days of receiving the Disputes Review Board's recommendations, both the Department and Developer will respond to the other and to the Disputes Review Board in writing, signifying either acceptance or rejection of the Disputes Review Board's recommendations. The failure of either Party to respond within the [15] day period will be deemed an acceptance of the Disputes Review Board's recommendations by that Party. The recommendations of the Disputes Review Board shall be binding only to the extent the Parties accept such recommendations, either expressly or to the extent deemed accepted by virtue of that Party's failure to respond within such [15] day period.
11. Should the Dispute remain unresolved, either Party may seek reconsideration of the decision by the Disputes Review Board only when there is new evidence to present.

24.2.2 While both the Department and Developer should place great weight on the Disputes Review Board's recommendation, it is not binding. Notwithstanding the foregoing, any Disputes Review Board recommendation regarding Disputes over Department decisions regarding Substantial Completion and Final Acceptance shall be provisionally binding pending the results of litigation filed by the Party disputing the Disputes Review Board's recommendation.

24.2.3 If the Disputes Review Board's recommendations do not resolve the Dispute, all records and written recommendations of the Disputes Review Board will be admissible as evidence in any subsequent proceedings.

24.3 Regional Disputes Review Board

Except as provided under Section 24.4, Disputes arising after Final Acceptance (excluding Disputes relating to latent defects arising after Final Acceptance related to Work performed prior to Final Acceptance) shall be submitted to the Regional Disputes Review Board in accordance with the procedures set forth in Appendix 10-C.

24.4 Statewide Disputes Review Board for Value Added Specifications

Disputes related to the performance of the “value added” specification requirements set forth in [Section ___ of Division ___] shall be submitted to the Statewide Disputes Review Board for Valued Added Specifications in accordance with the procedures established by the Department.

24.5 Right to Litigate Dispute, Suits By and Against the Department, Limitations of Actions, and Forum

24.5.1 The Department and Developer agree that the submission of any unresolved Dispute to the Disputes Review Board, Regional Disputes Review Board, or Statewide Disputes Review Board for Value Added Specifications (as applicable) under this Article 24 is a condition precedent to the Department or Developer having the right to proceed to litigation of such unresolved Dispute.

24.5.2 Suits by and against the Department arising out of the D&C Work or the O&M Work during the Construction Period shall be commenced no later than [820] days after the Department’s issuance of notice of Substantial Completion pursuant to Section 4.9.2 (if such notice is given), or in the event that this Agreement is terminated prior to the Department’s issuance of such notice of Substantial Completion, then no later than [820] days after the Early Termination Date. Suits by and against the Department arising out of any O&M Work performed after the Department’s issuance of notice of Substantial Completion pursuant to Section 4.9.2 shall be commenced no later than [820] days following the expiration of the Calendar Year in which the cause of action accrued as to such O&M Work.

24.6 Continuance of Work During Dispute

During the course of any Dispute Resolution Procedures, Developer shall continue performing the Work, including any Work that is the subject of the Dispute, as directed by the Department and in accordance with the Contract Documents.

ARTICLE 25. MISCELLANEOUS

25.1 Amendments

The Contract Documents may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns, except to the extent expressly provided otherwise in this Agreement.

25.2 Waiver

25.2.1 No waiver of any term, covenant or condition of this Agreement or the other Contract Documents shall be valid unless in writing and signed by the obligee Party.

25.2.2 The exercise by a Party of any right or remedy provided under this Agreement or the other Contract Documents shall not waive or preclude any other or further exercise thereof or the exercise of any other right or remedy. No waiver by any Party of any right or remedy under this Agreement or the other Contract Documents shall be deemed to be a waiver of any other or subsequent right or remedy under this Agreement or the other Contract Documents.

The consent by one Party to any act by the other Party requiring such consent shall not be deemed to render unnecessary the obtaining of consent to any subsequent act for which consent is required, regardless of whether similar to the act for which consent is given.

25.2.3 Except as provided otherwise in the Contract Documents, no act, delay or omission done, suffered or permitted by one Party or its agents shall be deemed to waive, exhaust or impair any right, remedy or power of such Party hereunder, or to relieve the other Party from the full performance of its obligations under this Agreement or the other Contract Documents.

25.2.4 Either Party's waiver of any breach or to enforce any of the terms, covenants, conditions or other provisions of the Contract Documents at any time shall not in any way limit or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision, any course of dealing or custom of the trade notwithstanding. Furthermore, if the Parties make and implement any interpretation of the Contract Documents without documenting such interpretation by an instrument in writing signed by both Parties, such interpretation and implementation thereof will not be binding in the event of any future Disputes.

25.3 Independent Contractor

25.3.1 Developer is an independent contractor, and nothing contained in the Contract Documents shall be construed as constituting any relationship with the Department other than that of Project developer and independent contractor, and that of landlord and tenant under the Lease.

25.3.2 Nothing in the Contract Documents is intended or shall be construed to create any partnership, joint venture or similar relationship between the Department and Developer; and in no event shall either Party take a position in any tax return or other writing of any kind that a partnership, joint venture or similar relationship exists. While the term "public-private partnership" may be used on occasion to refer to contractual relationships of the type hereby created, the Parties do not thereby express any intention to form or hold themselves out as a *de jure* or *de facto* partnership, joint venture or similar relationship, to share net profits or net losses, or to give the Department control or joint control over Developer's financial decisions or discretionary actions concerning the Project and Work.

25.3.3 In no event shall the relationship between the Department and Developer be construed as creating any relationship whatsoever between the Department and Developer's employees. Neither Developer nor any of its employees is or shall be deemed to be an employee of the Department. Except as otherwise specified in the Contract Documents, Developer has sole authority and responsibility to employ, discharge and otherwise control its employees and has complete and sole responsibility as a principal for its agents, for all Contractors and for all other Persons that Developer or any Contractor hires to perform or assist in performing the Work.

25.4 Successors and Assigns

The Contract Documents shall be binding upon and inure to the benefit of the Department and Developer and their permitted successors, assigns and legal representatives.

25.5 Designation of Representatives; Cooperation with Representatives

25.5.1 The Department and Developer shall each designate an individual or individuals who shall be authorized to make decisions and bind the Parties on matters relating to the Contract Documents (“**Authorized Representative**”). Appendix 11 to this Agreement provides the initial Authorized Representative designations. Such designations may be changed by a subsequent writing delivered to the other Party in accordance with Section 25.9.

25.6 Survival

Developer’s representations and warranties, the Dispute Resolution Procedures contained in Article 24 and the Disputes Review Board Agreement, the indemnifications and releases contained in Section 16.4, the rights and obligations regarding compensation contained in Article 19 and any other obligations to pay amounts hereunder, and all other provisions which by their inherent character should survive expiration or earlier termination of this Agreement and/or completion of the Work under this Agreement, shall survive the expiration or earlier termination of this Agreement and/or the completion of the Work under this Agreement. The provisions of Article 24 and the Disputes Review Board Agreement shall continue to apply after expiration or earlier termination of this Agreement to all Claims and Disputes between the Parties arising out of the Contract Documents.

25.7 Limitation on Third-Party Beneficiaries

It is not intended by any of the provisions of the Contract Documents to create any third-party beneficiary hereunder or to authorize anyone not a Party hereto to maintain a suit for personal injury or property damage pursuant to the terms or provisions hereof, except to the extent that specific provisions (such as the warranty and indemnity provisions, and the provisions for the protection of certain Lenders under Article 12 and the Direct Agreement) identify third parties and state that they are entitled to benefits hereunder. Except as otherwise provided in this Section 25.7, the duties, obligations and responsibilities of the Parties to the Contract Documents with respect to third parties shall remain as imposed by Law. The Contract Documents shall not be construed to create a contractual relationship of any kind between the Department and a Contractor or any Person other than Developer.

25.8 Governing Law

The Contract Documents shall be governed by and construed in accordance with the laws of the State of California.

25.9 Notices and Communications

25.9.1 Notices under the Contract Documents shall be in writing and (a) delivered personally, (b) sent by certified mail, return receipt requested, (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, or (d) sent by facsimile or email communication followed by a hard copy and with receipt confirmed by telephone, to the following addresses (or to such other address as may from time to time be specified in writing by such Person):

25.9.1.1 All notices, correspondence and other communications to Developer shall be delivered to the following address or as otherwise directed by Developer’s Authorized Representative:

Attn:

Telephone:

Facsimile:

E-mail:

In addition, copies of all notices to proceed, notices regarding Disputes, and suspension, termination and default notices shall be delivered to the following persons:

[addresses]

25.9.1.2 All notices, correspondence and other communications to the Department shall be marked as regarding the Project and shall be delivered to the following address or as otherwise directed by the Department's Authorized Representative:

Attn:

Telephone:

Facsimile:

E-mail:

In addition, copies of all notices regarding Disputes, and termination and default notices shall be delivered to the following person:

Attn:

Telephone:

Facsimile:

E-mail:

25.9.2 Notices shall be deemed received when actually received in the office of the addressee (or by the addressee if personally delivered) or when delivery is refused, as shown on the receipt of the U. S. Postal Service, private carrier or other Person making the delivery. Notwithstanding the foregoing, notices sent by facsimile after 4:00 p.m., Pacific Standard or Daylight Time (as applicable), and all other notices received after 5:00 p.m., Pacific Standard or Daylight Time (as applicable), shall be deemed received on the first business day following delivery (that is, in order for a fax to be deemed received on the same day, at least the first page of the fax must have been received before 4:00 p.m., Pacific Standard or Daylight Time (as applicable)). Any technical or other communications pertaining to the Work shall be conducted

by Developer's Authorized Representative and technical representatives designated by the Department.

25.10 Integration of Contract Documents

The Department and Developer agree and expressly intend that, subject to Sections 1.2.2, 1.2.3 and 25.12, this Agreement and other Contract Documents constitute a single, non-severable, integrated agreement whose terms are interdependent and non-divisible.

25.11 Severability

If any clause, provision, section or part of the Contract Documents is ruled invalid by a court having proper jurisdiction, then the Parties shall (a) promptly meet and negotiate a substitute for such clause, provision, section or part, which shall, to the greatest extent legally permissible, effect the original intent of the Parties, including an equitable adjustment to the Financial Model Update (or, if there has been no update, the Financial Model) and Developer's compensation to account for any change in the Work resulting from such invalidated portion, and (b) if necessary or desirable, apply to the court or other decision maker (as applicable) which declared such invalidity for an interpretation of the invalidated portion to guide the negotiations. The invalidity or unenforceability of any such clause, provision, section or part shall not affect the validity or enforceability of the balance of the Contract Documents, which shall be construed and enforced as if the Contract Documents did not contain such invalid or unenforceable clause, provision, section or part.

25.12 Construction and Interpretation of Agreement

25.12.1 The language in all parts of the Contract Documents shall in all cases be construed simply, as a whole and in accordance with its fair meaning and not strictly for or against any Party. The Parties hereto acknowledge and agree that the Contract Documents have been the subject of a careful, thorough, arm's length exchange of ideas, questions, answers, information and drafts during the Proposal preparation process, that each Party has been given the opportunity to independently review the Contract Documents with legal counsel, and that each Party has the requisite experience and sophistication to understand, interpret and agree to the particular language of the provisions of the Contract Documents. Accordingly, in the event of an ambiguity in or Dispute regarding the interpretation of the Contract Documents, the Contract Documents shall not be interpreted or construed against the Party preparing them, and instead other rules of interpretation and construction shall be utilized. The Department's final answers to the questions posed during the Proposal preparation process for this Agreement shall in no event be deemed part of the Contract Documents and shall not be relevant in interpreting the Contract Documents except as they may clarify provisions otherwise considered ambiguous.

25.12.2 The captions of the articles, sections and subsections of this Agreement are for convenience only and shall not be deemed part of this Agreement or considered in construing this Agreement.

25.12.3 References in this instrument to this "Agreement" mean, refer to and include this instrument as well as the riders, exhibits, addenda, attachments or other documents affixed hereto (which are hereby incorporated herein by reference) or other documents expressly incorporated by reference in this instrument. Any references to any covenant, condition, obligation and/or undertaking "herein," "hereunder" or "pursuant hereto" (or language

of like import) mean, refer to and include the covenants, conditions, obligations and undertakings existing pursuant to this instrument and any riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument. All terms defined in this instrument shall be deemed to have the same meanings in all riders, exhibits, addenda, attachments or other documents affixed to or expressly incorporated by reference in this instrument unless the context thereof clearly requires the contrary. Unless expressly provided otherwise, all references to Attachments, Articles and Sections refer to the Attachments, Articles and Sections set forth in this Agreement or the Technical Requirements. Where a specific Section is referenced, such reference shall include all subsections thereunder. Unless otherwise stated in this Agreement or the other Contract Documents, words which have well-known technical or construction industry meanings are used in this Agreement or the other Contract Documents in accordance with such recognized meaning. All references to a subsection or clause "above" or "below" refer to the denoted subsection or clause within the Section in which the reference appears. Wherever the word "including," "includes" or "include" is used in the Contract Documents, it shall be deemed to be followed by the words "without limitation". Wherever reference is made in the Contract Documents to a particular Governmental Entity, it includes any public agency succeeding to the powers and authority of such Governmental Entity.

25.12.4 As used in this Agreement and as the context may require, the singular includes the plural and vice versa, and the masculine gender includes the feminine and vice versa.

25.13 Approvals under Contract Documents

25.13.1 Refer to Section 3.3 regarding the standards for Department approval or consent.

25.13.2 In all cases where approvals or consents are required to be provided under the Contract Documents by Developer and no particular standard for such approvals or consents is expressly provided, such approvals or consents shall not be unreasonably withheld or delayed. In cases where sole discretion is specified, Developer's decision shall be final, binding and not subject to the Dispute Resolution Procedures.

25.14 Entire Agreement

The Contract Documents contain the entire understanding of the Parties with respect to the subject matter thereof and supersede all prior agreements, understandings, statements, representations and negotiations between the Parties with respect to their subject matter.

25.15 Counterparts

This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Agreement as of the date first written above.

[XXXXXXXXXXXXXXXXXXXXXXXXXX]

**CALIFORNIA DEPARTMENT OF
TRANSPORTATION**

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

FOR DEPARTMENT USE ONLY

APPROVED AS TO FORM:

[XXXXXXXXXXXXXXXXXXXXX]

Appendix

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1 Definitions

APPENDIX 1

ABBREVIATIONS

AAN	American Association of Nurserymen, Inc.
AASHTO	American Association of State Highway and Transportation Officials
ACI	American Concrete Institute
ADA	Americans with Disabilities Act
ADL	Aerially Deposited Lead
AGC	The Associated General Contractors of America, Inc.
AGMA	American Gear Manufacturers Association
AIA	American Institute of Architects.
AISC	American Institute of Steel Constructors
AISI	American Iron and Steel Institute
AMCA	Air Movement and Control Association
ANSI	American National Standards Institute, Inc.
AREA	American Railway Engineering Association
AREMA	American Railway Engineering and Maintenance-of-Way Association
ASCE	American Society of Civil Engineers
ASME	American Society of Mechanical Engineers
ASTM	American Society for Testing and Materials
AWG	American Wire Gauge
AWPA	American Wood Preservers Association
AWS	American Welding Society
AWWA	American Water Works Association
CEQA	California Environmental Quality Act (§§ 21000 <i>et seq.</i> of the California Public Resources Code)
CMS	Changeable Message Sign
CCTV	Closed Circuit Television
CRSI	Concrete Reinforcing Steel Institute
CSLB	Contractors State License Board
EASA	Electrical Apparatus Service Association
EIA	Electronic Industries Association
EOR	Engineer of Record
EPA	Environmental Protection Agency of the United States Government
FEMA	Federal Emergency Management Agency

FHWA	Federal Highway Administration
FSS	Federal Specifications and Standards
GFCI	Ground Fault Circuit Interrupter
HAR	Highway Advisory Radio
IEEE	Institute of Electrical and Electronics Engineers
IES	Illuminating Engineering Society
IMMS	Integrated Maintenance Management System
IRI	International Roughness Index
IPCEA	Insulated Power Cable Engineers Association
ISO	International Organization for Standards
ITS	Intelligent Transportation Systems
IVHS	Intelligent Vehicle Highway Systems
LIBOR	London Interbank Offered Rate
MSTCSD	Minimum Specifications for Traffic Control Signals and Devices
MTS	Maintenance Testing Specifications
MUTCD	Manual on Uniform Traffic Control Devices
MVDS	Multipoint Video Distribution System
NESC	National Electrical Safety Code
NEMA	National Electrical Manufacturers Association
NEPA	National Environmental Policy Act (42 U.S.C. §§ 4321 <i>et seq.</i>)
NETA	InterNational Electrical Testing Association
NFPA	National Fire Protection Association
NIST	National Institute for Standards and Technology
NOAA	National Oceanic and Atmospheric Administration
NPDES	National Pollutant Discharge Elimination System
NPS	National Park Service
<u>NTCIP</u>	National Transportation Communications for Intelligent Transportation Systems Protocol.
OSHA	Occupational Safety and Health Administration
PG&E	Pacific Gas and Electric Company
RFP	Request for Proposals
RFQ	Request for Qualifications
ROW	Right of Way
RWIS	Road Weather Information Systems

SAE	Society of Automotive Engineers
SCADA	Supervisory Control and Data Acquisition
SFCTA	San Francisco County Transportation Authority.
SI	International System of Units
SSPC	Steel Structures Painting Council
<u>TSCS</u>	Traffic Surveillance and Control System
UDBE/DBE	Underutilized Disadvantaged Business Enterprise or Disadvantaged Business Enterprise
UL	Underwriters' Laboratories
USDOT	United States Department of Transportation.
UXO	Unexploded Ordinance
VMS	Variable Message Sign

UNITS OF MEASUREMENT

Some of the symbols for U. S. Customary units of measurement used in the specifications and in the Engineer's Estimate are defined as follows:

Symbols as used in the Specifications	Symbols as used in the Engineer's Estimate	Definitions
A	—	amperes
	ACRE	acre
	CF	cubic foot
	CY	cubic yard
—	EA	each
g	—	gram
ksi	—	kips per square inch
	GAL	gallon
h	H	hour
	LB	pound
—	LS	lump sum
	LF	linear foot
	LNMI	lane mile
	MFBM	thousand foot board measure
	MI	mile
	MSYD	thousand station yard
Ω	—	ohm
pcf	—	pounds per cubic foot
s	—	second
	STA	100 feet
	SQFT	square foot
	SQYD	square yard
	TAB	tablet
ton	TON	2,000 pounds
W	—	watt
V	—	volt

DEFINITIONS

Actual Insurance Policy(ies) has the meaning set forth in Section 2.4 of Appendix 9 to the Agreement.

Adjust(ed) means perform(ed) a Utility Adjustment (including Protection in Place).

Adjustment Standards means the standard specifications, standards of practice, and construction methods that a Utility Owner customarily applies to facilities (comparable to those being Adjusted on account of the Project) constructed by the Utility Owner (or for the Utility Owner

by its contractors), at its own expense, as the same may be amended by the Utility Owner from time to time.

Affiliate means:

- (a) Any Person in which an Equity Member holds directly or indirectly a Controlling Interest;
- (b) Any Person which holds directly or indirectly a Controlling Interest in an Equity Member; or
- (c) Any Person in which the Person referenced in clause (b) of this definition holds directly or indirectly a Controlling Interest.

Affiliated means having the status of an Affiliate.

Age means the elapsed time since an Element was first constructed or installed or, if applicable, last reconstructed, rehabilitated, restored, renewed or replaced.

Agreement means that certain Public-Private Agreement, to which this Appendix 1 is attached, executed by the Department and Developer, including any and all Appendices and amendments thereto.

Airspace means any and all real property, including but not limited to the surface of the ground: (a) that is within the vertical column extending above and below the surface boundaries of the Project Right of Way; (b) title of which is held in fee simple by the Department; and (c) that is not necessary or required for the Project (including Upgrades) or for developing, permitting, designing, financing, constructing, installing, equipping, operating, maintaining, repairing, reconstructing, restoring, rehabilitating, renewing or replacing the Project (including Upgrades).

Architect means an architect as defined in Section 5500 of the California Business and Professions Code licensed in the State or a professional architectural corporation as defined in Section 5610 of the California Business and Professions Code authorized to render professional services in the State.

Architect of Record means an Architect registered in the State of California that approves and stamps architectural documents on behalf of Developer or the Lead Engineering Firm.

As-Built Record Plans means construction drawings, specifications, and related documentation furnished by Developer that reflect the actual conditions and location in detail of the Phase II Construction as constructed and installed; usually generated initially as marked-up Final Design Documents and finally as finished revised drawings and documents, also known as as-built plans.

As-Built Schedule means the schedule describing the actual order and time for performing the D&C Work as set forth in [Section ___ of Division ___].

Authority means the San Francisco County Transportation Authority.

Authorized Representative means the individuals authorized to make decisions and bind the parties on matters relating to the Contract Documents pursuant to Section 25.5 of the Agreement.

Auxiliary Lane means a lane adjoining the General Purpose Lanes or another Auxiliary Lane, which is used for speed change, turning, storage for turning, weaving, or other purposes.

Availability Payment means the amount earned in each given year by Developer as determined in accordance with Appendix 7 to the Agreement.

Background Intellectual Property means all Intellectual Property developed by Developer or its Affiliates or Contractors that derives commercial value from its protection as a trade secret under applicable Law or from its protection under patent law but was created, used, applied and reduced to practice independently of the Project and the Work.

Backward Looking Termination for Convenience Amount means the amount calculated in accordance with Section 19.1.3 of the Agreement.

Base means (whether capitalized or not) a layer of specified material of planned thickness placed immediately below the pavement or surfacing.

Baseline Report means the report on the baseline asset condition of the Phase I Construction prepared pursuant to Section 4.14 of the Agreement.

Baseline Substantial Completion Date means the scheduled date for Substantial Completion set forth in the initial Project Schedule included in Appendix 2-A to the Agreement.

Basement Material means (whether capitalized or not) the material in excavation or embankments underlying the lowest layer of Subbase, Base, Pavement, surfacing or other specified layer which is to be placed.

Best Management Practice means the exercise of the degree of skill, diligence, prudence and foresight which would reasonably and ordinarily be expected from time to time from a skilled and experienced designer, engineer, constructor, operator or Developer seeking in good faith to comply with its contractual obligations, complying with all applicable Laws and Governmental Approvals, and engaged in the same type of undertaking under similar circumstances and conditions.

Betterment has, with respect to a given Utility, the meaning (if any) set forth in the Utility Agreement(s) applicable to the Utility; in all other cases, "Betterment" means any upgrading of the Utility in the course of a Utility Adjustment that is not required as a result of the construction of the Project and is made solely for the benefit of and at the election of the Utility Owner, including an increase in the capacity, capability, efficiency or function of an Adjusted Utility over that which was provided by the existing Utility. Notwithstanding the foregoing, the following are not considered Betterments unless otherwise provided in the applicable Utility Agreement(s):

- (a) Any upgrading which is required for accommodation of the Project;
- (b) Replacement devices or materials that are not identical, but meet equivalent standards;

- (c) Replacement of devices or materials no longer regularly manufactured with an equivalent or next higher grade or size;
- (d) Any upgrading required by applicable Law;
- (e) Replacement devices or materials that are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase);
- (f) Any upgrading required by the Utility Owner's applicable Adjustment Standards; and
- (g) Any discretionary decision by a Utility Owner that is contemplated within a particular standard described in clause (f) above.

Breakage Costs means any prepayment premiums or penalties, make-whole payments or other prepayment amounts, including costs of early termination of interest rate hedging arrangements, that Developer must pay, or that may be payable or credited to Developer, under any Financing Document or otherwise as a result of the prepayment, redemption or acceleration of the maturity of any Project Debt or the termination, in whole or in part, of any interest rate swaps or commitments to lend or provide Project Debt.

Bridge means (whether capitalized or not) a structure, including supports, erected over a depression or over an obstruction such as water, Highway or railway, or for elevated Roadway, for carrying traffic or other moving loads, and having a length, measured along the center of the Roadway, of more than 20 feet between the inside faces of end supports. A multiple-span box culvert is considered a Bridge, where the length between the extreme ends of the openings exceeds 20 feet.

Business Day means each day on which the Department is officially open for business and each day on which Department employees are not on furlough.

Business Opportunity has the meaning set forth in Section 20.2.1 of the Agreement.

Calendar Day means every day shown on the calendar, ending and beginning at midnight.

Calendar Year means the consecutive 12-month period starting on January 1 and ending on December 31.

Change in Law means (a) the adoption of any Law of the State at any point after the date that corresponds to the date [30] days prior to the Proposal Submission Date, (b) any change in any Law of the State or in the interpretation or application thereof by any Governmental Entity of the State after [30] days prior to the Proposal Submission Date, or (c) any change in the Adjustment Standards applicable to a Utility Adjustment after [30] days prior to the Proposal Submission Date, in each case that is materially inconsistent with Laws or Adjustment Standards, respectively, in effect [30] days prior to the Proposal Submission Date; excluding, however, (i) any change in or new Law of the State passed or adopted but not yet effective as of [30] days prior to the Proposal Submission Date, (ii) any change in Adjustment Standards that qualifies as a Betterment, (iii) any change in State labor Laws, and (iv) any change in State tax Laws of general application except the levy of State or local property taxes on the Developer's Interest (it being understood that any change in State tax laws shall not be deemed of general application if it is solely directed at and the effect of which is solely borne by Developer or private operators of transportation assets or transportation asset Developers, in each case, in the State).

Change of Control means any Equity Transfer that results in a loss or acquisition of a Controlling Interest in Developer. Notwithstanding the foregoing, the following shall not constitute a Change of Control:

(a) The grant of Security Documents, including the Initial Security Documents, in strict compliance with Section 12.1 of the Agreement or the exercise of Lender remedies thereunder, including foreclosure, subject to Section 13.1.4 of the Agreement;

(b) A change in possession of the power to direct or control the management of Developer or a material aspect of its business due solely to bona fide open market transactions in securities effected on a recognized public stock exchange, including such transactions involving an initial public offering; and

(c) A change in possession of the power to direct or control the management of Developer or a material aspect of its business due solely to a bona fide transaction involving beneficial interest in a parent organization of a shareholder, member, partner or joint venture member of Developer whose references, experience or financial statements were not considered or evaluated in the Statement of Qualifications or Proposal, unless the transferee in such transaction is at the time of the transaction suspended or debarred or subject to a proceeding to suspend or debar from bidding, proposing or contracting with any federal, State or local department or agency.

Change Proposal means a written proposal submitted by Developer pursuant to Section 10.2 of the Agreement.

Claim means a written demand submitted by Developer pursuant to the Contract Documents, which is or potentially could be disputed by the Department, for a time extension or payment of money or damages from the Department to Developer. Claim also means a written demand submitted by the Department pursuant to the Contract Documents, which is or potentially could be disputed by Developer, for payment of money or damages from Developer to the Department.

Claim Deductible means the following amounts, as applicable: (a) the first US\$[],000] of Extra Work Costs; and (b) the amount equal to the Delay Costs for the first [] days of delay.

Closure means that all or part of any traffic lanes, ramps, direct connectors or cross roads of a Segment is closed or blocked, or that the use thereof is otherwise restricted for any reason during the Operating Period. The magnitude of every Closure on a Segment is described by a corresponding O&M Noncompliance Event Classification as set forth in Section 4, Table 4.2 of Division II.

Collateral Agent means the financial institution listed or otherwise designated to act as trustee or agent on behalf of or at the direction of the Lenders in the Security Documents or intercreditor agreement or similar document with respect to the Project Debt, a copy of which shall be delivered by Developer to the Department.

Committed Investment means (a) any form of direct investment by Equity Members, including the purchase of equity shares in and/or the provision of Equity Members Debt to Developer or (b) an irrevocable on-demand letter of credit issued by or for the account of an Equity Member naming Developer as beneficiary, satisfying the requirements of Sections 16.3.2.1, 16.3.2.2, 16.3.2.5 and 16.3.2.6 of the Agreement and guaranteeing the provision of the direct investment referenced in clause (a) of this definition by a date which is no later than one year after

the scheduled date for Final Acceptance set forth in the initial Project Schedule included in Appendix 2-A of the Agreement.

Committed Investment Cash Flows means Distributions described in clause (a) of the definition of Distributions, minus Committed Investment described in clause (a) of the definition of Committed Investment.

Common Element means any element of a Segment that is used by or related to two or more Segments. Common Elements are deemed to be part of two or more Segments such that if a Common Element is subject to an O&M Noncompliance Event, then an O&M Noncompliance Event shall be considered to be occurring simultaneously in each Segment.

Completion Deadline means the Construction Commencement Deadline, the Scheduled Substantial Completion Date, the Final Acceptance Deadline and the Long Stop Date, as applicable. "Completion Deadline" does not include the Financial Close Deadline.

Compliance Work means any Work required as a direct result of the Relief Events described in clauses (b), (c) (d), (e), (f), (g), (h), (l), (m) (p) or (q) of the definition of Relief Event.

Conduit means (whether capitalized or not) a pipe or tube in which smaller pipes, tubes or electrical conductors are inserted or are to be inserted.

Construction Affecting Public Safety means construction that may jeopardize public safety such as structures spanning functioning vehicular Roadways, pedestrian walkways, railroads, navigation channels of navigable waterways and walls or other structure foundations located in embankments immediately adjacent to functioning roadways. It does not apply to those areas of the Site under Developer's control and outside the limits of normal public access.

Construction Closure means that all or part of any traffic lanes, ramps, direct connectors or cross roads of the Segment is closed or blocked, or that the use thereof is otherwise restricted for any reason during the Construction Period.

Construction Closure Adjustment means the amount assigned to each Construction Closure as set forth in Table C of Appendix 4-B to the Agreement.

Construction Commencement Deadline means the date that is the earlier of (a) [210] days after issuance of the Financing Commencement Notice or (b) [30] days after the date of Financial Close, as the same may be adjusted in accordance with the Agreement.

Construction Documents means all plans, shop drawings, working drawings, fabrication plans, material and hardware descriptions, specifications, construction quality control reports, construction quality assurance reports and samples necessary or desirable for construction of the Project in accordance with the Contract Documents.

Construction Noncompliance Adjustment means the amount assigned to each Construction Noncompliance Event as set forth in Table A of Appendix 4-B to the Agreement.

Construction Noncompliance Event means the failure to meet one of the minimum performance requirements during the Construction Period as set forth in Section 4, Table 4.1 of Division II within the applicable cure period (if any).

Construction Noncompliance Event Classification means the relative classification from letter “A” through letter “E” assigned to Construction Noncompliance Events as set forth in Section 4, Table 4.1 of Division II of the Agreement.

Construction Period means the period starting on the date of issuance of NTP2 and ending on the Substantial Completion Date.

Construction Period O&M Limits means the areas in which the O&M During Construction is to be performed , as identified in [Appendix 5C] [Section ____ of Division II].

Construction Quality Plan means the plan prepared for quality assurance and quality control of the Construction Work in accordance with Section 2 of Division II.

Construction Traffic Control Plan means Developer’s plan for traffic management during construction of the Project, prepared in accordance with Section 3 of Division II.means Developer’s plan for traffic management during construction of the Project, prepared in accordance with Section 3 of Division II.

Construction Work means all Work to build or construct, make, form, manufacture, furnish, install, supply, deliver, landscape or equip the Project.

Consumer Price Index or **CPI** means the “Consumer Price Index – U.S. City Averages for all Urban Consumers, All Items” (not seasonally adjusted) as published by the U.S. Department of Labor, Bureau of Labor Statistics; provided, however, that if the CPI is changed so that the base year of the CPI changes, the CPI shall be converted in accordance with the conversion factor published by the U.S. Department of Labor, Bureau of Labor Statistics. If the CPI is discontinued or substantially altered, the applicable substitute index will be that chosen by the Secretary of the Treasury for the Department of Treasury’s Inflation-Linked Treasuries as described at 62 Federal Register 846-847 (January 6, 1997), or if no such securities are outstanding, will be determined by the Parties in accordance with general market practice at the time.

Contaminated Materials means Hazardous Materials.

Contaminated Materials Management means Hazardous Materials Management.

Contract means any agreement, and any supplement or amendment thereto, by Developer with any other Person, Contractor or Supplier to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work, or any such agreement, supplement or amendment at a lower tier, between a Contractor and its lower tier Contractor or a Supplier and its lower tier Supplier, at all tiers. The term Contract excludes Utility Agreements.

Contract Documents means the Agreement, the Technical Requirements, including all Appendices and exhibits to the Agreement and Technical Requirements (and the executed originals of exhibits that are contracts), and the other documents listed in Section 1.2 of the Agreement, including all amendments to the foregoing and all issued Supplemental Agreements. “Contract Documents” include the Lease.

Contract Time means the number of calendar days allowed for completion of the D&C Work calculated from the number of days between the date identified in NTP 1 and the Final Acceptance Deadline, including authorized time extensions.

Contractor means any Person with whom Developer has entered into any Contract to perform any part of the Work or provide any materials, equipment or supplies for the Project, on behalf of Developer, and any other Person with whom any Contractor has further subcontracted any part of the Work, at all tiers.

Controlling Interest means an interest held by a Person in another Person when:

- (a) Such Person holds, directly or indirectly, beneficially or of record, a majority of the voting rights in such other Person; or
- (b) Such Person possesses, directly or indirectly, the power to cause the direction of the management of such other Person, whether through voting securities, by contract, family relationship or otherwise.

Controlling Work Item means the activity or work item on the critical path of the D&C Work having the least amount of total Float. The Controlling Work Item may also be referred to as a "Critical Activity."

Critical Path means (whether capitalized or not capitalized) the longest chain(s), in terms of time, of logically connected activities on the Project Schedule ending with Final Acceptance.

Culvert means (whether capitalized or not) any structure not classified as a bridge that provides an opening under the roadway.

Customer Relations Unit means a function of Developer's O&M Work that serves as the means for the general public to inquire about any issues related to the Project and also serves as the means to distribute information about the Project to the public, all as further defined in Section 4 of Division II.

Day or **day** means Calendar Day unless otherwise expressly specified as a Business Day.

D&C Work means the Design Work and Construction Work, including those obligations of Developer identified in Section 3 of Division II.

Deductible Relief Event means the Relief Events referenced in clauses (a), (b), (e), (l) through (o), (q), (t) and (u) of the definition of Relief Event.

Default Termination Event means each of the Developer Defaults listed in Section 19.4.1 of the Agreement.

Deferral of Compensation means the election of the Department to pay Extra Work Costs or Delay Costs through any one of the following or a combination thereof:

- (a) Extension of the Term;
- (b) Adjustment of the MAP; or
- (c) Periodic payments over the Term.

Delay means any unanticipated event, action, force or factor during the performance of the D&C Work, which extends Developer's time of performance of any Controlling Work Item. The

term “Delay” is intended to cover all such events, actions, forces or factors, whether styled “delay”, “disruption”, “interference”, “impedance”, “hindrance”, or otherwise, which are beyond the control of and not caused by Developer or any Developer-Related Entity. The term “Delay” does not include “Extra Work.”

Delay Costs means Developer’s additional costs that result from a Delay to the Work caused by a Relief Event, which are limited to costs for the actual idle labor and equipment, at the rates set forth in **[INSERT RATE CALCULATION REFERENCE]**, and the indirect costs, expenses and profit thereon, calculated pursuant to **[INSERT REFERENCE FOR METHOD TO CALCULATE INDIRECT COSTS, EXPENSES AND PROFIT]**; provided that for Delays to non-Controlling Work Items, the term Delay Costs does not include any indirect costs, expenses or profit thereon. Delay Costs do not include any costs that Developer can reasonably mitigate.

Department means the California Department of Transportation, and any entity succeeding to the powers, authorities and responsibilities of the Department invoked by or under the Contract Documents.

Department-Caused Delays means delays directly attributable to the following matters and no others, but only to the extent that they (a) are not mitigated by or susceptible to handling by a work around or consumption of Float, and (b) are not due to the negligence, willful misconduct, breach of contract or violation of Law or Governmental Approval by any Developer-Related Entity:

- (a) Failure of the Department to issue NTP 1 by five days after Developer satisfies the requirements in Section 4.6 of the Agreement, respectively;
- (b) Failure of the Department to issue NTP 2 by the later of (i) [February 29, 2012] or (ii) five days after Developer satisfies the requirements in Sections 4.7.1 through 4.7.13 of the Agreement;
- (c) Department Changes;
- (d) Failure of the Department to provide responses to proposed schedules, plans, Design Documents, and other Submittals and matters for which a response is required as an express prerequisite to Developer’s right to proceed or act, within the time periods (if any) indicated in the Contract Documents, or if no time period is indicated, within a reasonable time, taking into consideration the nature, importance and complexity of the Submittal or matter, following delivery of written notice from Developer requesting such action in accordance with the terms and requirements of the Contract Documents;
- (e) Suspension of Work orders issued by the Department pursuant to Section 18.2.7.2 of the Agreement;
- (f) Any suspension of Work arising from Force Majeure Events or litigation shall not be considered a Department-Caused Delay (although it may qualify as a Relief Event under clauses (a) or (o), respectively of the definition of “Relief Event”), despite the fact that the Department may specifically direct Developer to suspend the Work. Further, any suspension of Work arising from the Department’s performance of data recovery respecting archeological, paleontological or cultural resources or the Department’s actions related to endangered or threatened species or Release of Hazardous Materials shall not be considered a Department-Caused Delay (although

it may qualify as a Relief Event under clauses (l), (m) or (n), respectively, of the definition of “Relief Event”), despite the fact that the Department may specifically direct Developer to suspend the Work.

Department Change means an alteration or change in the Work or the terms and conditions of the Technical Requirements authorized or directed by the Department pursuant to Article 10 of the Agreement.

Department Default has the meaning set forth in Section 18.3.1 of the Agreement.

Department’s Recoverable Costs means:

- (a) The reasonably required costs of any assistance, action, activity or Work undertaken by the Department which Developer is liable for or is obligated to reimburse the Department for under the terms of the Contract Documents, including the charges of third-party contractors and reasonably allocated wages, salaries, compensation and overhead of Department staff and employees performing such action, activity or Work; plus
- (b) Reasonably required out of pocket costs the Department incurs to publicly procure any such third-party contractors; plus
- (c) Reasonable fees and costs of attorneys (including the reasonably allocable fees and costs of the Department’s attorneys), financial advisors, engineers, architects, insurance brokers and advisors, investigators, traffic consultants, risk management consultants, other consultants, and expert witnesses, as well as court costs and other litigation costs, in connection with any such assistance, action, activity or Work, including in connection with defending claims by and resolving disputes with third-party contractors; plus
- (d) Interest on all the foregoing sums at the Late Payment Rate, commencing on the date due under the applicable terms of the Contract Documents and continuing until paid.

Department Utility Accommodation Manual means the Department Utility Accommodation Manual issued by the Department, **[INSERT STATUTORY / REGULATORY REFERENCE AS APPROPRIATE]**, as the same may be amended, supplemented or replaced from time to time.

Design and Construction Costs means the cost for the D&C Work of the Project as set forth in the Schedule of Values, as may be amended to reflect Supplemental Agreements and Unilateral Payments for Delay Costs and Extra Work Costs related to the D&C Work.

Design Criteria (Design Standards) means standards, measures and expectations used in evaluating and verifying design performance for the Project, as set forth in the Technical Requirements.

Design Documents means all drawings (including plans, profiles, cross-sections, notes, elevations, typical sections, details and diagrams), specifications, reports, studies, calculations, electronic files, records and submittals necessary for, or related to, the design of the Project. Design Documents include the Final Design Documents.

Design Quality Plan means the plan prepared for quality assurance and quality control of the Design Work in accordance with [Section ___ of Division ___].

Design Work means all Work related to the design, engineering or architecture for the Project.

Detour means (whether capitalized or not) a temporary route for traffic around a closed portion of a Road.

Developer means [INSERT NAME], and its permitted successors and assigns.

Developer Default has the meaning set forth in Section 18.1.1 of the Agreement.

Developer Originated Designs means items which the Contract Documents require the Developer to design, detail and incorporate into the Permanent Works.

Developer-Related Entity(ies) means (a) Developer, (b) Equity Members, (c) Contractors at all tiers (including Suppliers), (d) any other Persons performing any of the Work, (e) any other Persons for whom Developer may be legally or contractually responsible, and (f) the employees, agents, officers, directors, shareholders, representatives, consultants, successors, assigns and invitees of any of the foregoing.

Developer's Financial Plan means the financial plan Developer submitted to the Department as part of the Proposal.

Developer's Interest means all right, title, interest and estate, real or personal, of Developer in, to, under or derived from the Agreement and the other Contract Documents, including (a) Developer's leasehold estate in the Project and Project Right of Way under the Lease, (b) Developer's right, title and/or interest in and to the Milestone Payments and Availability Payments earned, Handback Requirements Reserve Account, Submittals, Claims and Intellectual Property, and (c) any right of Developer to collect tolls and users fees.

Developer's Lead Personnel means the collection of Specialty Engineers, environmental specialists, and consultants employed by Developer to oversee specific aspects of the Work and outlined in Division I.

Developer's Proposal Commitments are those commitments made by Developer in its Proposal and attached as Appendix 2 to the Agreement.

Direct Agreement means the agreement in the form attached as Appendix 14 to the Agreement by and among the Department, Developer, and the Lender (or if there is more than one Lender, the Collateral Agent on behalf of the Lenders) respecting the Lenders' rights to notice, step-in and cure of Developer Defaults. The Direct Agreement shall follow the "Form of Direct Agreement" provided as Appendix 14 to the Agreement in all material respects.

Director means the executive officer of the Department, as created by Law.

Discriminatory O&M Change means (a) materially more onerous application to Developer or the Project of alterations or changes (including additions) to the Technical Requirements relating to the O&M Work than the application thereof to other comparable Department projects, or (b) selective application of alterations or changes (including additions) to the Technical Requirements

relating to the O&M Work to Developer or the Project and not to other comparable Department projects. Notwithstanding the foregoing, such application in response to any negligence, willful misconduct, or breach of applicable Law, Governmental Approval or contract by Developer or any Developer-Related Entity shall not be Discriminatory O&M Changes. A Discriminatory O&M Change is a Department Change.

Dispute means any dispute, disagreement or controversy between the Department and Developer concerning their respective rights and obligations under the Contract Documents, including concerning any Claim, alleged breach or failure to perform and remedies.

Dispute Resolution Procedures means the procedures for resolving Disputes set forth in Article 24 of the Agreement.

Disputes Review Board means the disputes review board established pursuant to Appendix 10-A to the Agreement to aid in the resolution of Disputes pursuant to Section 24.2 of the Agreement.

Disputes Review Board Agreement means the agreement in the form attached as Appendix 10-A to the Agreement.

Distribution means (a) whether in cash or in kind, any (i) dividend or other distribution in respect to share capital, (ii) reduction of capital, redemption or purchase of shares or any other reorganization or variation to share capital, (iii) payments under Equity Members Funding Agreements (whether of principal, interest, breakage costs or otherwise), (iv) payment, loan, contractual arrangement or transfer of assets or rights to the extent (in each case) it was put in place after Financial Close and was neither in the ordinary course of business nor on reasonable commercial terms, (v) the receipt of any other benefit which is not received in the ordinary course of business and not on reasonable commercial terms, or (b) the early release of any contingent funding liabilities, the amount of such release being deemed to be a gain for the purposes of any calculation of Refinancing Gain.

District 4 Director means the individual employed by the Department who holds the position of director for District 4 of the Department.

Divided Highway means (whether capitalized or not) a highway with separated Traveled Ways for traffic, generally in opposite directions.

Division I means Division I of the Technical Requirements.

Division II means Division II of the Technical Requirements.

Early Completion Date means [INSERT DATE].

Early Termination Date means the effective date of termination of the Agreement for any reason prior to the stated expiration of the Term, as specified in the relevant provisions of Section 16.1.2.12 or Article 19 of the Agreement.

Effective Date means the later of the date on which the Department and Developer have mutually executed and delivered the Agreement, or such other date as they shall have mutually agreed upon in writing.

Element means an individual component, system or subsystem, including landscaping, of the Project.

Eligible Investments means any one or more of the following securities:

- (a) Direct obligations of, and obligations fully and unconditionally guaranteed by, (i) the United States of America or (ii) any agency or instrumentality of the United States of America the obligations of which are backed by the full faith and credit of the United States of America;
- (b) Demand or time deposits, federal funds or bankers' acceptances issued by any depository institution or trust company, provided that (i) any demand or time deposit or certificate of deposit is fully insured by the Federal Deposit Insurance Corporation or (ii) any commercial paper or the short-term deposit rating or the long-term unsecured debt obligations or deposits of such depository institution or trust company at the time of such investment or contractual commitment providing for such investment have been rated "A" or higher by a Rating Agency;
- (c) Commercial paper (including both non-interest-bearing discount obligations and interest-bearing obligations payable on demand or on a specified date not more than one year after the date of issuance thereof) which has been rated "A" or higher by a Rating Agency at the time of such investment;
- (d) Any money market funds, the investments of which consist of cash and obligations fully and unconditionally guaranteed by (i) the United States of America or (ii) any agency or instrumentality of the United States of America the obligations of which are backed by the full faith and credit of the United States of America and which have been rated "A" or higher by a Rating Agency; and
- (e) Other investments listed in Section 16430 of the California Government Code.

Emergency means any unforeseen event affecting the Project whether directly or indirectly which (a) causes or has the potential to cause disruption to the free flow of traffic on the Project or a threat to the safety of the public; (b) is an immediate or imminent threat to the integrity of any part of the infrastructure of the Project, to the Environment or to property adjacent to the Project; or (c) is recognized or declared by the Department or a Governmental Entity as an emergency.

Emergency Response Plan means the plans and procedures prepared under Section 4 of Division II by Developer that are to be implemented to protect the O&M Limits from governor declared Emergencies and other Emergencies.

Engineer of Record (EOR) means the Professional Engineer, retained by Developer or the Lead Engineering Firm, that performs the design and analysis, and is responsible for the preparation of the Design Documents.. "Engineer of Record" also means and will apply to the Shop Drawing checker and certifier retained by Developer or the Lead Engineering Firm, regardless of whether that party is normally the Engineer of Record or a Specialty Engineer.

Engineer's Estimate means the list of estimated quantities of work to be performed as contained in [Proposal Form ____].

Environment means air, soils, surface waters, groundwaters, land, stream sediments, surface or subsurface strata, biological resources, including endangered, threatened and sensitive species, natural systems, including ecosystems, and cultural, historic, archeological and paleontological resources.

Environmental Approvals means all Governmental Approvals arising from or required by any Environmental Law in connection with construction, use or operation of the Project, including approvals and permits required under the National Environmental Policy Act (42 U.S.C. §§ 4321 *et seq.*), as amended, or the California Environmental Quality Act (§§ 21000 *et seq.* of the California Public Resources Code) . Environmental Approvals include the NEPA/CEQA Approval and the Programmatic Agreement.

Environmental Law means (a) any Law applicable to the Project or the Work regulating or imposing liability or standards of conduct that pertains to the Environment, Hazardous Materials, contamination of any type whatsoever, or health and safety matters, and (b) any requirements and standards that pertain to the protection of the Environment, or to the management or Release of Hazardous Materials, contamination of any type whatsoever, or health and safety matters with respect to Hazardous Materials, set forth in any permits, licenses, approvals, plans, rules, regulations or ordinances adopted, or other criteria and guidelines promulgated, pursuant to Laws applicable to the Project or the Work, as each of the foregoing have been or are amended, modified, or supplemented from time to time (including any present and future amendments thereto and reauthorizations thereof), including those relating to:

- (a) The manufacture, processing, use, distribution, existence, treatment, storage, disposal, generation and transportation of Hazardous Materials;
- (b) Air, soil, surface and subsurface strata, stream sediments, surface water, and groundwater;
- (c) Releases of Hazardous Materials;
- (d) Protection of wildlife, endangered, threatened, and sensitive species, wetlands, water courses and water bodies, cultural, historical, archeological, and paleontological resources and natural resources;
- (e) The operation and closure of underground or aboveground storage tanks;
- (f) Health and safety of employees and other persons with respect to Hazardous Materials; and
- (g) Notification, documentation and record keeping requirements relating to the foregoing.

Without limiting the above, the term “Environmental Laws” shall also include the following (all as amended):

- i. The National Environmental Policy Act (42 U.S.C. §§ 4321 *et seq.*);
- ii. The Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9601 *et seq.*);

- iii. The Solid Waste Disposal Act (42 U.S.C. §§ 6901 *et seq.*);
- iv. The Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. §§ 11001 *et seq.*);
- v. The Clean Air Act (42 U.S.C. §§ 7401 *et seq.*);
- vi. The Federal Water Pollution Control Act, as amended by the Clean Water Act (33 U.S.C. §§ 1251 *et seq.*);
- vii. The Resource Conservation and Recovery Act (42 U.S.C. §§ 6901, *et seq.*);
- viii. The Toxic Substances Control Act (15 U.S.C. §§ 2601 *et seq.*);
- ix. The Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 *et seq.*);
- x. Section 404 of the Clean Water Act (33 U.S.C. § 1344);
- xi. The Oil Pollution Act (33 U.S.C. §§ 2701, *et. seq.*);
- xii. The Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§ 136 *et seq.*);
- xiii. The Federal Safe Drinking Water Act (42 U.S.C. §§ 300 *et seq.*);
- xiv. The Federal Radon and Indoor Air Quality Research Act (42 U.S.C. §§ 7401 *et seq.*);
- xv. The Occupational Safety and Health Act (29 U.S.C. §§ 651 *et seq.*);
- xvi. The Endangered Species Act (16 U.S.C. §§ 1531 *et seq.*);
- xvii. The Fish and Wildlife Coordination Act (16 U.S.C. §§ 661 *et seq.*);
- xviii. The Coastal Zone Management Act (33 U.S.C. §§ 1451 *et seq.*);
- xix. The Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 *et seq.*);
- xx. The Migratory Bird Treaty Act (16 U.S.C. §§ 703 *et seq.*);
- xxi. The Marine Mammal Protection Act (16 U.S.C. §§ 1361 *et seq.*);
- xxii. 33 C.F.R. §§ 114 and 125;
- xxiii. The California Environmental Quality Act (§§ 21000 *et seq.* of the California Public Resources Code);
- xxiv. The California Clean Air Act of 1988 (§§ 39000 *et seq.* of the California Health and Safety Code);
- xxv. The California Occupational Safety and Health Act of 1973 (§§63000 *et seq.* of the California Labor Code);

- xxvi. The Porter-Cologne Water Quality Act (§§ 13000 *et seq.* of the California Water Code);
- xxvii. The California Coastal Act (§§ 30000 *et seq.* of the California Public Resource Code);
- xxviii. The Integrated Waste Management Act (§§ 40000 *et seq.* of the California Public Resources Code);
- xxix. The Safe Drinking Water and Toxic Enforcement Act (§§ 25249.5 *et seq.* of the California Health and Safety Code);
- xxx. Chapter 6.5 of Division 20 of the California Health and Safety Code (§§ 25100 *et seq.*); and
- xxxi. §§ 1600 *et seq.* of the California Fish and Game Code

Equipment means (whether capitalized or not) the machinery and equipment, together with the necessary supplies for upkeep and maintenance thereof, and all other tools and apparatus necessary for the construction and acceptable completion of the Work.

Equity IRR means the nominal post-tax internal rate of return to the Committed Investment described in clause (a) of the definition of Committed Investment, over the full Term calculated using the Financial Model as the discount rate that, when applied to Committed Investment Cash Flows, gives a zero net present value. Accordingly, (i) the Equity IRR can only change when and if the Financial Model is updated in accordance with Section 14.2 of the Agreement, and (ii) the Equity IRR initially is equal to the Original Equity IRR. For purposes of this definition, the phrase “post-tax” refers only to U.S. federal and state income tax liability of Developer or its Equity Members and specifically excludes (A) any foreign income tax and other tax of any kind, and (B) any withholding tax, including any tax that Developer or an Equity Member is obligated to withhold on Distributions (whether actual or constructive) or other payments or allocations to Equity Members or holders of debt of or equity interests in an Equity Member under 26 U.S.C. §§ 1441 – 1446, notwithstanding 26 U.S.C. § 1461.

Equity Member means any Person with a direct equity interest in Developer.

Equity Members Debt means bona fide indebtedness for funds borrowed that: (a) is held by any Equity Member or an Affiliate, or by a purchaser or assignee of such indebtedness held at any previous time by any Equity Member or Affiliate, and (b) is subordinated in priority of payment and security to all Project Debt held by Persons who are not Equity Members or Affiliates.

Equity Members Funding Agreements means any Funding Agreements relating to Equity Members Debt.

Equity Members Security Documents means any Security Documents securing Equity Members Debt.

Equity Transfer means any assignment, mortgage, encumbrance, conveyance, sale, or other transfer of equity interest in Developer.

Escalated Benchmark Insurance Premiums has the meaning set forth in Section 2.5 of Appendix 9 to the Agreement.

Escrow Agent has the meaning set forth in Section 21.5.2 of the Agreement.

Excessive Closure means:

- (a) Any Construction Closure that: (i) is not a Permitted Construction Closure, (ii) is caused by a Developer-Related Entity and (iii) affects more than $[2/3]$ of the Traffic Lanes of any portion of a Segment; or
- (b) Any Closure that: (i) is not a Permitted Closure, (ii) is caused by a Developer-Related Entity, and (iii) affects more than $[2/3]$ of the Traffic Lanes of any portion of a Segment.

Excluded Premium Increases has the meaning set forth in Section 2.1 of Appendix 9 to the Agreement.

Exempt Refinancing means (a) any Refinancing that was fully and specifically identified and taken into account in the Original Financial Model and calculation of the Availability Payment, (b) any amendment, modification, supplement, or consent to any Financing Document or the exercise by a Lender of rights, waivers, consents and similar actions in the ordinary course of day-to-day loan administration and supervision which does not provide a financial benefit to Developer, (c) any changes in taxation or Developer's accounting treatment or policies, and (d) any of the following acts by a Lender: (i) the syndication in the ordinary course of business of any of such Lender's rights and interests in the Funding Agreements related to Project Debt; (ii) the grant by such Lender of any rights of participation, or the disposition by such Lender of any of its rights or interests, in respect of the Funding Agreements related to Project Debt in favor of any other Lender or any investor; or (iii) the grant by such Lender of any other form of benefit or interest in either the Funding Agreements related to Project Debt or the revenues or assets of Developer, whether by way of security or otherwise, in favor of any other Lender or any investor.

Extra Work means any Work which is required by the Department to be performed by Developer and which at that time is not otherwise covered or included in the Project by the Contract Documents, whether it is in the nature of additional work, altered work, deleted work, or otherwise. The term "Extra Work" includes additional Work or changes in the Work attributable to the Department's changes in terms and conditions of the Technical Requirements (including changes in the standards applicable to the Work), except to the extent provided otherwise in Sections 4.1.2.3 and 8.2.1 of the Agreement. The term "Extra Work" does not include "Delay."

Extra Work Costs means the incremental increase in Developer's costs directly attributable to Extra Work, which include labor and burden costs, material and supply costs, equipment costs, and indirect costs, including expenses and profit; which costs shall be calculated pursuant to **[INSERT REFERENCE TO CALCULATION METHOD]**.

Falsework means (whether capitalized or not) any temporary construction work used to support the permanent structure until it becomes self-supporting. Falsework includes steel or timber beams, girders, columns, piles and foundations, and any proprietary equipment including modular shoring frames, post shores, and adjustable horizontal shoring.

Fast Cure Period has the meaning set forth in Section 6.3.1.5 of the Agreement.

Federal Agencies means any agency or officer of the federal government, and any agency or officer succeeding in accordance with law to the powers, duties, jurisdiction and authority of the agency or officer mentioned.

Federal Requirements means the provisions required to be part of federal-aid construction contracts by applicable Law, including those federal Laws and Developer requirements under federal Laws identified in Division I and Appendix 20.

Final Acceptance means the occurrence of all the events and satisfaction of all the conditions set forth in Section 4.9.3.1 of the Agreement, as and when confirmed by the Department's issuance of a notice in accordance with the procedures and within the time frame established in Section 4.9.3 of the Agreement.

Final Acceptance Construction Payment Adjustment means the sum of all Construction Noncompliance Adjustments, Construction Noncompliance Adjustments and Construction Closure Adjustments, as calculated in accordance with Section 3.1 of Appendix 4-B to the Agreement.

Final Acceptance Date means the date upon which Developer achieves Final Acceptance.

Final Acceptance Deadline means the date by which Developer must achieve Final Acceptance, which shall be **[90]** days after the Scheduled Substantial Completion Date, subject to adjustment in accordance with the Agreement.

Final Design means, depending on the context: (a) the Final Design Documents; (b) the design concepts set forth in the Final Design Documents; or (c) the process of developing the Final Design Documents.

Final Design Documents means the complete final construction drawings, including plans, profiles, cross-sections, notes, elevations, typical sections, design exceptions and variations, details and diagrams, specifications, reports, studies, calculations, electronic files, records and submittals prepared by Developer, necessary or related to construction and maintenance of the Project.

Financial Close means the satisfaction or waiver of all conditions precedent set forth in Section 15.2.5 of the Agreement to the first utilization under the Initial Funding Agreements relating to the long-term financing of the Initial Project Debt.

Financial Close Deadline means the deadline for achieving Financial Close, which shall be 180 days after issuance of the Financing Commencement Notice, as the same may be adjusted in accordance with Section 9.2.5.1 of the Agreement.

Financial Close Security means the bond or letter of credit in the amount of **[\$__]** million provided by Developer to the Department under [Section ____] of Volume I of the RFP (Instructions to Proposers)], as it may be increased pursuant to Section 15.2.2.1 of the Agreement.

Financial Model means the financial computer model, including the Financial Model Formulas and the related output, audited by an independent model auditor reasonably acceptable to the Department that is used to produce the financial forecasts pursuant to the Funding Agreements and which is represented by material contained on computer disks and printouts, copies of which are held in the Intellectual Property Escrow and by the Department and Developer (and which are attached as Appendix 2-C to the Agreement), and which includes certain

projections and calculations with respect to revenues, expenses, the repayment of Project Debt and Distributions to initial Equity Members that result in achievement of the Equity IRR. The Financial Model may be updated after Financial Close as provided in Section 14.2 of the Agreement. Before Financial Close and until the first Financial Model Update, the Original Financial Model shall serve as the Financial Model.

Financial Model Formulas means the mathematical formulas that Developer and the Department have agreed upon as of the Effective Date, as the same may be changed with the prior written agreement of both Parties, for projecting Equity IRR, which mathematical formulas are used as part of the Original Financial Model and Financial Model, and are used as part of each Financial Model Update, but without the data and information used by or incorporated in the Financial Model or Financial Model Update.

Financial Modeling Data means all back-up information regarding the basis for Developer's estimates, projections and calculations in its Proposal, in the Original Financial Model, in the Financial Model and in Financial Model Updates of revenues, pricing, costs, expenses, repayment of Facility Debt, Distributions and internal rate of return, including:

- (a) **[Form ___ of the Proposal (Detailed Costing Form)]**;
- (b) The data book submitted with the Proposal, fully describing all assumptions underlying the estimates, projections and calculations in the Original Financial Model, and updates to such data book related to the Financial Model and Financial Model Updates;
- (c) The step by step instructions on the procedure to run and to optimize the Financial Model Formulas, the Original Financial Model and Financial Model Updates;
- (d) Copies of all offers, and all data and information within this definition, received from all Contractors (at all tiers) identified in the Proposal and any other potential Contractors that provided data and information used as the basis for **[Form ___ of the Proposal]**;
- (e) Copies of all offers, and all data and information within this definition, received from all Contractors (at all tiers) related to any Relief Event;
- (f) All information and documents in the sealed container Developer submitted with its Proposal labeled **["[Proposer Name]: Escrowed Financial Proposal for the Presidio Parkway Project—Detailed Financing Terms,"]** describing the amounts, timing, terms and other commercially sensitive provisions associated with each equity source, loan facility and debt instrument included in Developer's Financial Plan; and
- (g) All other supporting data, technical memoranda, calculations, formulas, unit and materials prices (if applicable) and such other cost, charge, fee and revenue information used by Developer in the creation and derivation of its Proposal or of the Financial Model or any Financial Model Update, or related to any Relief Event.

Financial Model Update means any update to the Financial Model prepared pursuant to Section 14.2 of the Agreement.

Financing Commencement Notice has the meaning set forth in Section 25.2.2 of the Agreement.

Financing Documents means Funding Agreements and Security Documents.

Fiscal Year means the consecutive 12-month period starting on July 1 and ending on June 30.

Fixed Costs mean any necessary labor, material and equipment costs directly expended on the item or items under consideration which remain constant regardless of the quantity of the work done.

Float has the meaning set forth in [Section ___ of Division ___].

Force Majeure Event means the occurrence of any of the following events that materially and adversely affects performance of Developer's obligations, provided that such events (or the effects of such events) could not have been avoided by the exercise of caution, due diligence, or reasonable efforts by Developer or any Developer-Related Entity: (a) war (including civil war and revolution), invasion, armed conflict, violent act of foreign enemy, military or armed blockade, or military or armed takeover of the Work, in each case occurring within the State of California; (b) any act of riot, insurrection, civil commotion or sabotage that causes direct physical damage to the Work; (c) nuclear explosion, radioactive contamination of the Site, unless the source of the explosion or radioactive contamination, is brought to or near the Site by any Developer-Related Entity; (d) fire, explosion, Seismic Event, flood caused by natural events, gradual inundation caused by natural events, sinkhole caused by natural events or landslide caused by natural events; (e) Terrorism; or (f) any governor declared Emergency within the limits of the Project Right of Way.

Formwork means (whether capitalized or not) any structure or mold used to retain plastic or fluid concrete in its designated shape until it hardens. Formwork comprises common materials such as wood or metal sheets, battens, soldiers and walers, ties, proprietary forming systems such as stay-in-place metal forms, and proprietary supporting bolts, hangers and brackets. Formwork may be either permanent formwork requiring a shop drawing submittal such as stay-in-place metal or concrete forms, or may be temporary formwork which requires certification by the Specialty Engineer for Construction Affecting Public Safety and for Major and Unusual Structures.

Forward Looking Termination for Convenience Amount means the amount calculated in accordance with Section 19.1.4 of the Agreement.

Frontage Road means a local street or road auxiliary to and located generally on the side of an arterial highway for service to abutting property and adjacent areas and for control of access.

Funding Agreement means:

- (a) Any loan agreement, funding agreement, account maintenance or control agreement, intercreditor agreement, subordination agreement, trust indenture, hedging agreement, swap agreement, credit insurance policy, guaranty, indemnity agreement, reimbursement agreement, or other agreement by, with or in favor of any Lender pertaining to or evidencing Project Debt (including any Refinancing), other than Security Documents;

- (b) Any note, bond or other negotiable or non-negotiable instrument evidencing the indebtedness of Developer for Project Debt (including any Refinancing); and
- (c) Any amendment, supplement, variation or waiver of any of the foregoing agreements or instruments.

General Purpose Lanes means the Traffic Lanes of the Project other than Auxiliary Lanes.

Governmental Approval means any permit, license, consent, concession, grant, franchise, authorization, waiver, variance or other approval, guidance, protocol, mitigation agreement, agreement or memoranda of agreement/understanding, and any amendment or modification of any of them provided by Governmental Entities including State, local, or federal regulatory agencies, agents, or employees, which authorize or pertain to the Project or the Work. Governmental Approvals include the Presidio Trust Right of Entry Agreement and the Programmatic Agreement.

Governmental Entity means any federal, State or local government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity other than the Department.

Governor Declared Emergencies and Other Emergencies means _____ [Definition to be provided by the Department for Caltrans defined term].

Grading Plane means (whether capitalized or not) the surface of the Basement Material upon which the lowest layer of Subbase, Base, pavement, surfacing or other specified layer is placed.

Guarantor means any Person that is the obligor under any guaranty in favor of the Department required under the Agreement, including any guaranty of a Key Contract with the Lead Contractor or the Lead Operations and Maintenance Firm.

Handback Evaluation Criteria means the guidelines, tests, standards and other information to be used in the Handback Evaluation Plan.

Handback Evaluation Plan means the plan prepared by Developer that identifies the detailed inspection and testing procedures, criteria and protocols to be performed to determine the condition of the assets within the O&M Limits. The plan also shall include the method of calculating the residual life of the assets.

Handback Renewal Amount means the cost of the Handback Renewal Work determined according to Section 5 of Division II, which is required to be expended to ensure the Project meets the Handback Requirements.

Handback Renewal Work means the Renewal Work required in order for the Project to meet Handback Requirements.

Handback Renewal Work Plan means the plan prepared in accordance with Section 5 of Division II.

Handback Requirements means the terms, conditions, requirements and procedures governing the condition in which Developer is to deliver the assets within the O&M Limits to the

Department upon expiration or earlier termination of the Agreement, as set forth in Section 5 of Division II.

Handback Requirements Letter of Credit means the letter of credit of that name described in Section 5.10.4.1 of the Agreement.

Handback Requirements Reserve Account means the account of that name established pursuant to Section 5.10.1 of the Agreement.

Hazardous Materials means any element, chemical, compound, mixture, material or substance, whether solid, liquid or gaseous, which at any time is defined, listed, classified or otherwise regulated in any way under any Environmental Laws, or any other such substances or conditions (including mold and other mycotoxins, fungi or fecal material) which may create any unsafe or hazardous condition or pose any threat or harm to the environment or human health and safety. "Hazardous Materials" includes the following:

- (a) Hazardous wastes, hazardous material, hazardous substances, hazardous constituents, and toxic substances, ignitable, corrosive and reactive substances or related materials, whether solid, liquid, or gas, including substances defined as or included in the definition of "hazardous substance", "hazardous waste", "hazardous material", "extremely hazardous waste", "acutely hazardous waste", "radioactive waste", "radioactive materials", "bio-hazardous waste", "pollutant", "toxic pollutant", "contaminant", "restricted hazardous waste", "infectious waste", "toxic substance", "toxic waste", "toxic material", or any other term or expression intended to define, list or classify substances by reason of properties harmful to health, safety or the indoor or outdoor environment (including harmful properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, "TCLP" toxicity" or "EP toxicity" or words of similar import under any applicable Environmental Laws);
- (b) Any petroleum product, including crude oil and any fraction thereof, and including any refined petroleum product or any additive thereto or fraction thereof; and any waste oil or waste petroleum byproduct or fraction thereof or additive thereto;
- (c) Any solvent, solvent waste, including any refined solvent product, and any waste solvent or waste solvent byproduct, including any additive, byproduct or fraction of any of the foregoing;
- (d) Any drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal resources;
- (e) Any flammable substances or explosives, including unexploded ordnance;
- (f) Any radioactive materials;
- (g) Any asbestos or asbestos-containing materials;
- (h) Silica;

- (i) Any lead, cadmium, or lead-based paint or any other heavy metal-based paint or material, or any metal listed in or regulated by the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.);
- (j) Any radon or radon gas;
- (k) Any methane gas or similar or regulated gaseous materials;
- (l) Any urea formaldehyde foam insulation;
- (m) Electrical equipment and components which contain any oil or dielectric fluid containing polychlorinated biphenyls;
- (n) Pesticides, herbicides or fungicides;
- (o) Any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any Governmental Entity or which may or could pose a hazard to the health and safety of the owners, operators, Users or any Persons in the vicinity of the Project or to the indoor or outdoor Environment; and
- (p) Soil, or surface water or groundwater containing any of the Hazardous Materials as defined above.

Hazardous Materials Management means procedures and requirements to address Hazardous Materials conditions and contamination encountered, impacted, caused by or occurring in connection with the Project, Project Right of Way or the Work, as well as investigation and remediation of such Hazardous Materials where required. Hazardous Materials Management may include sampling, stock-piling, storage, backfilling in place, asphalt batching, recycling, treatment, clean-up, remediation, transportation and/or off-site disposal of Hazardous Materials, whichever approach is effective, most cost-efficient and authorized under applicable Law and Governmental Approvals.

High Priority Hour(s) has the meaning set forth in Section 3.4 in Appendix 4-B to the Agreement during the Construction Period and in Table E in Section 5 of Appendix 7 to the Agreement during the Operating Period.

Highway, Street, or Road (whether capitalized or not) are general terms denoting a public way for purposes of vehicular travel.

Holidays means days designated by the State as holidays, which include New Year's Day, Martin Luther King Jr. Day, Cesar Chavez Day, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day and the following Friday, and Christmas Day.

Hour means a period of 60 minutes in a day, the first such period (calculated with reference to a 24 hour clock) commencing at 00:00 hours on that day, and each further period commencing on the hour.

Hourly Unavailability Adjustment means the product of (a) the Hourly Unavailability Factor, (b) the Segment Weighting Factor, (c) the Time Weighting Factor, and (d) MAPy/(365x24), calculated as provided in Section 2.1 of Appendix 7 to the Agreement.

Hourly Unavailability Factor means the number determined as provided in Section 5 of Appendix 7 to the Agreement that is used in calculating the Hourly Unavailability Adjustment for a Segment.

Incident means a localized disruption to the free flow of traffic or safety of Users on the Project.

Incident Response means the actions taken by Developer, as described in the O&M Plan, to respond to an Incident within the O&M Limits.

Indemnified Parties means the Department, the State, and their respective successors, assigns, agencies, divisions, officeholders, officers, directors, commissioners, agents, representatives, consultants and employees.

Indicative Preliminary Design means the conceptual and/or preliminary design included in the Reference Documents.

Initial Financing Documents means the Initial Funding Agreements and the Initial Security Documents.

Initial Funding Agreements means the Funding Agreements establishing the rights and obligations pertaining to the Initial Project Debt, either (a) as specifically identified in Appendix 8 to the Agreement to the extent executed and delivered by Developer on or before the Effective Date, or (b) as executed and delivered by Developer at Financial Close, to the extent Financial Close occurs after the Effective Date.

Initial Project Debt means the Project Debt incurred by Developer to originally finance the Project and Work, in at least the total amount set forth in Appendix 8 to the Agreement. The Initial Project Debt is evidenced and secured by the Initial Financing Documents.

Initial Security Documents means the Security Documents securing the Initial Project Debt, either (a) as specifically identified in Appendix 8 to the Agreement to the extent executed and delivered by Developer on or before the Effective Date or (b) as executed and delivered by Developer at Financial Close, to the extent Financial Close occurs after the Effective Date.

Instructions to Proposers means the Instructions to Proposers, including any addenda or riders, issued by the Department as part of the RFP.

Insurance Policies means all of the insurance policies Developer is required to carry or cause its Contractors to carry pursuant to Section 16.1 of the Agreement. "Insurance Policies" does not include the OCIP.

Insurance Review Report has the meaning set forth in Section 2.2 of Appendix 9 to the Agreement.

Insurer means the entity insuring risk under an Insurance Policy.

Intellectual Property means all current and future legal and/or equitable rights and interests in know-how, patents (including applications), copyrights (including moral rights), trade marks (registered and unregistered), service marks, trade secrets, designs (registered and unregistered), utility models, circuit layouts, plant varieties, business and domain names,

inventions, solutions embodied in technology, and other intellectual activity, and applications of or for any of the foregoing, subsisting in or relating to the Project, Project design data or Project traffic data. Intellectual Property includes traffic management algorithms, and software used in connection with the Project (including but not limited to software used for management of traffic on the Project), and software source code. Intellectual Property is distinguished from physical construction and equipment itself and from drawings, plans, specifications, layouts, depictions, manuals and other documentation that disclose Intellectual Property.

Intellectual Property Escrow has the meaning set forth in Section 21.5.2 of the Agreement.

Interval of Recurrence means for each Noncompliance, Construction Noncompliance Event and O&M Noncompliance Event, the period of time after which, unless already cured, such Noncompliance, Construction Noncompliance Event or O&M Noncompliance Event will be deemed to have occurred anew and therefore assessed another Construction Noncompliance Event Adjustment or O&M Noncompliance Event Adjustment, as applicable; provided, however, that there shall be no cure period for such new Noncompliance Event. The Intervals of Recurrence are set forth in Section 4 of Division II.

Key Contract means any one, or an aggregate of more than one, of the following Contracts for Work Developer causes to be performed:

- (a) All prime design Contracts, include the Contract with the Lead Engineering Firm;
- (b) All prime construction Contracts, including the Contract with the Lead Contractor;
- (c) All O&M Contracts, including the Contract with the Lead Operations and Maintenance Firm;
- (d) All prime project or program management services Contracts;
- (e) All prime maintenance Contracts, if any, unless with the Department; and
- (f) All other prime Contracts with a single Contractor which individually or in the aggregate total in excess of US\$[25,000,000].

Key Contractor means the Contractor under any Key Contract.

Key Personnel means those individuals appointed by Developer and approved by the Department from time to time to fill the following positions:

- (a) The Project Executive;
- (b) The Project Manager;
- (c) The superintendents for the Lead Contractor;
- (d) The lead design engineer from the Lead Engineering Firm;
- (e) The Quality Manager; and

- (f) Any other key members of Developer's management team or other individuals that were identified in the Proposal or in the Contract Documents.

Laboratory means the Division of Engineering Services - Materials Engineering and Testing Services and Division of Engineering Services - Geotechnical Services of the Department of Transportation, or established laboratories of the various districts of the Department, or other laboratories authorized by the Department to test materials and other items involved in the Work. When a reference is made in the Technical Requirements to the "Transportation Laboratory", the reference shall mean Division of Engineering Services - Materials Engineering and Testing Services and Division of Engineering Services - Geotechnical Services, located at 5900 Folsom Boulevard, Sacramento, CA 95819, Telephone (916) 227-7000.

Late Payment Rate means the rate established every year in accordance with the provisions of **[INSERT RELEVANT STATUTORY / REGULATORY REFERENCE]**.

Law or **Laws** means any statute, law, code, regulation, ordinance, rule, common law, judgment, judicial or administrative order, decree, directive, guideline, policy requirement or other governmental restriction (including those resulting from the initiative or referendum process) or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Entity, which is applicable to or has an impact on the Project or the Work, whether taking effect before or after the Effective Date, including Environmental Laws. "Laws," however, excludes Governmental Approvals.

Lead Contractor means **[INSERT NAME]**.

Lead Engineering Firm means **[INSERT NAME]**.

Lead Operations and Maintenance Firm means **[INSERT NAME]**.

Lease means the Project Lease to be entered into between Department and Developer pursuant to Sections 2.1 of the Agreement, in the form attached as Appendix 3 to the Agreement, as amended from time to time.

Lease Escrow Agreement means the agreement by that name entered or to be entered into by Developer and the escrow agent named therein, with Department as a named, intended third party beneficiary, for the purpose of holding for future delivery duplicate signed originals of the Lease.

Lender means each bank or financial institution, the U.S. Department of Transportation (when granting a TIFIA Loan), the PABs Issuer or any other holder of a beneficial interest in a Security Document, including any financial guarantor, which is a provider of Project Debt or any guaranty or credit enhancement in respect thereof, and any participating parties, trustees and agents, including the Collateral Agent, together with their respective successors and assigns.

LIBOR means the London Interbank Offered Rate, being a daily reference rate based on the interest rates at which banks borrow unsecured funds from other banks in the London wholesale money market, as calculated and published by the British Bankers' Association.

Long Stop Date means the date by which Developer must achieve Substantial Completion, which shall be 365 days after the Baseline Substantial Completion Date, subject to adjustment in accordance with the Agreement.

Losses means any loss, damage, injury, liability, obligation, cost, response cost, expense (including attorneys', accountants' and expert witnesses' fees and expenses (including those incurred in connection with the enforcement of any indemnity or other provision of the Agreement)), fee, charge, judgment, penalty, or fine. Losses include injury to or death of persons, damage or loss of property, and harm or damage to natural resources.

Low Priority Hour(s) has the meaning set forth in Section 3.4 in Appendix 4-B to the Agreement during the Construction Period and in Table E in Section 5 of Appendix 7 to the Agreement during the Operating Period.

Maintenance Manual means the manual prepared by Developer in accordance with Section 4 of Division II describing the maintenance procedures for the facilities and roadways within the O&M Limits.

Maintenance Report means the report to be prepared by Developer on a monthly basis, as required under Section 4 of Division II.

Major and Unusual Structures means bridges of complex geometry and/or complex design. Generally, this includes the following types of structures:

1. Bridges with an individual span longer than 300 feet;
2. Structurally continuous superstructures with spans over 150 feet;
3. Steel box and plate girder bridges;
4. Steel truss bridges;
5. Concrete segmental and longitudinally post-tensioned continuous girder bridges;
6. Cable stayed or suspension bridges;
7. Arch bridges;
8. Tunnels;
9. Movable bridges (specifically electrical and mechanical components); and
10. Rehabilitation, widening, or lengthening of any of the above.

Major Permits means those permits identified in Appendix 21 to the Agreement.

Major Permits Deadline means each date set forth in Appendix 21 to the Agreement for obtaining the applicable Major Permit.

Mandatory Technology Enhancement means the Technology Enhancements required under Section 8.1 of the Agreement.

The Manual on Uniform Traffic Control Devices means the Manual on Uniform Traffic Control Devices for Streets and Highways, 2003 Edition (MUTCD) as administered by the Federal Highway Administration. **The MUTCD 2003 California Supplement** (MUTCD California

Supplement) is issued by the Department to provide amendments to the MUTCD. The MUTCD and MUTCD California Supplement supersede the Department's Manual of Traffic Controls.

Manuals and Guidelines or **Governing Regulations** means the manuals, guidelines and other documents referenced in [Section ___ of Division ___] and incorporated into the Technical Requirements by such reference.

Materials mean (whether capitalized or not) any substances to be incorporated in, or encountered during the execution of, the Work under the Contract Documents.

Maximum Availability Payment or **MAP** means the maximum Availability Payment that Developer can earn in a given Fiscal Year during the Operating Period, as calculated in accordance with Appendix 7 to the Agreement, and as may be further adjusted in accordance with the Contract Documents.

Maximum Adjusted MAP means US\$[XXXXXXXXXXXXX].

Median means (whether capitalized or not) the portion of a Divided Highway or street separating the Traveled Ways for traffic moving in opposite directions.

Mid Priority Hour(s) has the meaning set forth in Table E in Section 5 of Appendix 7 to the Agreement.

Milestone Payments means the amounts identified in Section 4.9.4.1 of the Agreement.

Milestone Payment Adjustment means the amount to be deducted from the First Final Milestone Payment, as calculated in accordance with Appendix 4-B to the Agreement.

MMIS means Maintenance Management Information System.

Monthly Handback Reserve Deposit has the meaning set forth in Section 5.10.2.1 of the Agreement.

NEPA/CEQA Approval means the project report dated January 28, 2009 and the Final Environmental Impact Statement/Report and Final Section 4(f) Evaluation and Record of Decision dated September 2008 and December 18, 2008, respectively, for the Project, and all approved supplements and reevaluations thereof pertaining to the Project completed [30] days prior to the Proposal Submission Date.

Noncompliance means any breach or failure in performance of obligations under the Contract Documents that can result in the assessment of Noncompliance Points pursuant to Article 6 of the Agreement.

Noncompliance Points means the points that may be assessed for certain Noncompliance by Developer, as set forth in Appendix 6 to the Agreement.

Nonconforming Work means D&C Work that does not conform to the requirements of the Contract Documents.

Non-Discriminatory O&M Changes means alterations or changes (including additions) to provisions in the Technical Requirements relating to the O&M Work of general application to

comparable Department projects, including revisions to the Manuals and Guidelines, adoption of new manuals and publications, changed, added or replacement standards, criteria, requirements, conditions, procedures, specifications and other technical provisions. A Non-Discriminatory O&M Change is a Department Change.

Non-Discriminatory O&M Change Deductible has the meaning set forth in Section 5.2.2.6 of the Agreement.

Notice of Termination for Convenience means written notice issued by the Department to Developer terminating the Agreement for convenience under Section 19.1.1 of the Agreement.

NTP 1 means the written notice issued by the Department to Developer authorizing Developer to proceed with (a) completing the Project Management Plan and (b) Design Work following the Department's approval of the Project Management Plan.

NTP 2 means the written notice issued by the Department to Developer authorizing Developer to proceed with Construction Work and the O&M Work.

Offices of Structure Design of the Department of Transportation means the Department's Offices of Structure Design, Documents Unit, Mail Station 9-4/4I, 1801 30th Street, Sacramento, CA 95816, Telephone (916) 227-8252.

O&M After Construction means the operation and maintenance of all elements of the Project according to Table 4.2 in Section 4 of Division II. O&M After Construction will occur during the Operating Period.

O&M Annual Report means the annual report Developer submits to the Department for the O&M Work as set forth in Section 4 of Division II.

O&M Contract means any Contract entered into by Developer for third-party management, direction, supervision or performance of the O&M Work or any significant portion thereof. There may be more than one O&M Contract concurrently in effect.

O&M Contractor means the Contractor under any O&M Contract.

O&M During Construction – means the operation and maintenance of all permanent elements of Phase 1 Construction according to Table 4.2 in Section 4 of Division II and operations and maintenance of all residual elements of Doyle Drive, temporary elements of Phase I Construction, and all elements of Phase II Construction according to Table 4.1 in Section 4 of Division II. O&M During Construction will occur during the Construction Period.

O&M Limits means the Construction Period O&M Limits and the Operating Period O&M Limits.

O&M Manual means the manual consisting of the O&M Plan, Operations Manual and Maintenance Manual prepared by Developer that describes all of the activities, procedures and information necessary to operate and maintain the facilities and roadways within the O&M Limits as further described in Section 4 of Division II.

O&M Noncompliance Adjustment means an amount equal to the portion of the Maximum Availability Payment that Developer fails to earn due to the occurrence of an O&M Noncompliance Event as calculated in accordance with Appendix 7 to the Agreement.

O&M Noncompliance Event means the failure to meet one of the minimum performance requirements during the Operating Period in Section 4, Table 4.2 of Division II within the applicable cure period (if any).

O&M Noncompliance Event Classification means the relative classification from letter “A” through letter “E” assigned to O&M Noncompliance Events as set forth in Section 4, Table 4.2 of Division II of the Agreement.

O&M Plan means the plan prepared by Developer describing the plan, systems, approach, staffing and schedule to operate and maintain the facilities and roadways within the O&M Limits as further described in Section 4 of Division II.

O&M Quality Management System means the elements of Developer’s Quality Plan that are specific to the O&M Work as further described in Section 4 of Division II. The system shall include the necessary elements to provide the means for Developer to evaluate the quality and performance of the O&M Work, and shall include a quality assurance system to verify conformance to procedures, plans and accuracy.

O&M Quality Management System Reports means reports prepared by Developer that identify the results of the procedures and processes implemented by Developer via the O&M Quality Management System.

O&M Records means all documentation and data in connection with maintenance, operation, renewals and expansion of the Project including (a) all inspection and inventory records, whether generated by Developer or a third party, (b) any communication to and/or from the Department or a third party, and (c) any information system (as may be introduced or amended by the Department from time to time) in connection with operation, maintenance, renewal or handback of the Project or the Availability Payment (including O&M Noncompliance Events, Closures and Permitted Closures), Construction Noncompliance Events, Construction Closures, Permitted Construction Closures, and Noncompliance Point systems that the Department requires Developer to use or operate.

O&M Work means any and all operation, management, administration, maintenance, repair, preservation, modification, reconstruction, rehabilitation, restoration, renewal and replacement of any portion of the Project within the O&M Limits, including Renewal Work, Compliance Work, Planned Maintenance and those obligations of Developer identified in Section 4 of Division II.

OCIP means the owner-controlled insurance program described in Section 16.1.6 and Appendix 9 of the Agreement.

OCIP Administrator means the person designated by the Department to manage and administer the OCIP.

OCIP Manual has the meaning set forth in Section 16.1.6.6 of the Agreement.

OCIP Site means for each OCIP policy the Project areas and other areas or premises where Work is performed, if any, that the OCIP policy identifies as being within the scope of its coverage. The scope of the OCIP Site for one OCIP policy may be different from the scope of the OCIP Site for another OCIP policy. The OCIP Site may not include all the areas of the Site.

Open Book Basis means allowing the Department to review all underlying assumptions, data, documents and information associated with the Financial Model, each Financial Model Update, Schedule of Values, pricing or compensation or adjustments thereto, costs of the Work, Extra Work Costs, Delay Costs, costs claimed under Section 9.2.2 or 9.2.3 of the Agreement, schedule, composition of equipment spreads, equipment rates, labor rates, productivity, estimating factors, design and productivity allowance, contingency and indirect costs, risk pricing, discount rates, interest rates, inflation and deflation rates, traffic volumes, toll revenues (if applicable), changes in toll rates (if applicable), and other items reasonably required by TxDOT to satisfy itself as to reasonableness.

Operations Manual means the manual prepared by Developer in accordance with Section 4 of Division II describing the operations procedures for the facilities and roadways within the O&M Limits.

Operating Period means the period starting on the Substantial Completion Date and ending on the Termination Date.

Operating Period O&M Limits means the areas in which the O&M After Construction is to be performed as identified in [Appendix 5-D] [Section ____ of Division II].

Operating Traffic Management Plan means Developer's plan for traffic management in performing the O&M Work.

Operations Report means the report required to be prepared by Developer on a monthly basis as required by Section 4 of Division II.

Original Equity IRR means the Equity IRR projected in the Original Financial Model, which is [XXX] %.

Original Financial Model means the financial computer model, including the Financial Model Formulas and the related output, used to produce the financial forecasts in the Proposal, a hard copy of which is initialed by the Department and Developer on the Effective Date which includes certain projections and calculations with respect to revenues, expenses, the repayment of Project Debt and Distributions to initial Equity Members that result in achievement of the Original Equity IRR and that is attached as Appendix 2-B to the Agreement. The Original Financial Model will be updated on or before Financial Close:

- (a) To reflect any change in interest rates and commercial terms of the Initial Project Debt at Financial Close from those assumed in the Original Financial Model, pursuant to Appendix 7-A to the Agreement; and/or
- (b) [In accordance with Section 4.4 of Appendix 7-A to the Agreement, to reflect the use of Reserve Funds to reduce the MAP;]and/or
- (c) With the Department's prior consent, to reflect any outcomes of the model audit process of the Original Financial Model being conducted by the Lenders, provided,

however, that in no event shall the outcomes of such model audit result in an increase in the MAP or other payments that may be due to Developer under the Agreement.

Oversight CEI Consultant means the consulting firm under contract to the Department to provide validation and oversight of the Construction Work to ensure compliance with the Contract Documents.

PABs means private activity bonds allocated and issued pursuant to Section 11143 of Title XI of SAFETEA-LU, which amended Section 142 of the Internal Revenue Code to add highway and freight transfer facilities to the types of privately developed and operated projects for which private activity bonds may be issued.

PABs Issuer means, collectively, any Governmental Entity that issues PABs or other Project Debt.

Party means Developer or the Department, as the context may require, and “**Parties**” means Developer and the Department, collectively.

Pavement means (whether capitalized or not) the uppermost layer of material placed on the traveled way or shoulders. This term is used interchangeably with surfacing.

Payment Security means a payment bond [or letter of credit] in place as a condition to (a) the commencement of Design Work and the Department’s issuance of NTP 1; and (b) the commencement of Construction Work and the Department’s issuance of NTP 2 as set forth in Section 16.2.2 of the Agreement.

Performance Security means the performance bond(s) or letter(s) of credit in place as a condition to the commencement of (a) Design Work and the Department’s issuance of NTP 1; and (b) Construction Work and the Department’s issuance of NTP 2 as set forth in Section 16.2.1 of the Agreement.

Permanent Works means (whether capitalized or not) all the permanent structures and parts thereof required of the completed Project.

Permitted Closure means, subject to Section 9.2.4 of the Agreement:

- (a) Closures for performance of properly scheduled and executed Planned Maintenance as provided in Section 4 of Division II;
- (b) A Closure due to an Emergency that is not the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity nor considered a Relief Event, provided Developer is using commercially reasonable efforts to: (i) respond to the Emergency in accordance with the requirements of the Contract Documents, (ii) mitigate the impact of the Emergency, (iii) reopen the affected Segment(s) as quickly as possible to traffic during High Priority Hours and Mid Priority Hours, and (iv) minimize the impact of Developer’s activities to traffic flow during such Hours;
- (c) A Closure due to utility installation work during the Operating Period as provided in Section 5.2.6, provided Developer is using commercially reasonable efforts to (i)

avoid or minimize the impact thereof on traffic flow during High Priority Hours and Mid Priority Hours, (ii) reopen the affected Segment(s) as quickly as possible to traffic during High Priority Hours and Mid Priority Hours;

- (d) A Closure specified, caused or ordered by, and continuing only for so long as required by, the Department or any Governmental Entity (other than in its capacity as a Utility Owner), including Closures caused by a Relief Event described in clause (o), (p) or (q) of the definition of Relief Event, except to the extent such Closure is the result of the negligence, willful misconduct, or breach of applicable Law or contract, by Developer or any Developer-Related Entity;
- (e) A Closure as a result of a Relief Event described in clause (a) or (n) of the definition of Relief Event, in accordance with the limitations, provisions and conditions set forth in Section 9.2.4 of the Agreement, provided Developer is using commercially reasonable efforts to: (i) mitigate the impact of the Relief Event, (ii) reopen the affected Segment(s) as quickly as possible to traffic during High Priority Hours and Mid Priority Hours, and (iii) minimize the impact of Developer's activities to traffic flow during such Hours;
- (f) A Closure due to a Relief Event described in clause (i), (j), (k), (r), (s), (t) or (u) of the definition of Relief Event, provided Developer is using commercially reasonable efforts to: (i) mitigate the impact of the Relief Event, (ii) reopen the affected Segment(s) as quickly as possible to traffic during High Priority Hours and Mid Priority Hours, and (iii) minimize the impact of Developer's activities to traffic flow during such Hours; or
- (g) A Closure due to any other Relief Event not covered under clause (d), (e) or (f) of this definition of Permitted Closure shall be deemed a Permitted Closure only insofar as Developer's response to such Relief Event is deemed to be Compliance Work and undertaken as Planned Maintenance as provided for in Appendix 7 to the Agreement.

Notwithstanding the foregoing, in the event that any lane of a Segment is the subject of a Permitted Closure, and a Closure that is not a Permitted Closure occurs in the lane remaining in service, then the lanes subject to the Permitted Closure also shall be deemed to be subject to a Closure, which is not a Permitted Closure.

Permitted Construction Closure means:

- (a) A Construction Closure permitted under the traffic control restrictions in [Section ____ of Division ____];
- (b) A Construction Closure for performance of properly scheduled and executed Planned Maintenance as provided in Appendix 4-B to the Agreement;
- (c) A Construction Closure due to an Emergency that is not the result of the negligence, willful misconduct, or breach of applicable Law or contract by Developer or any Developer-Related Entity nor considered a Relief Event, provided Developer is using commercially reasonable efforts to: (i) respond to the Emergency in accordance with the requirements of the Contract Documents, (ii) mitigate the impact of the Emergency, (iii) reopen the affected Segment(s) as quickly as possible

to traffic during High Priority Hours and Mid Priority Hours, and (iv) minimize the impact of Developer's activities to traffic flow during such Hours; or

- (d) A Closure due to utility installation work during the Construction Period as provided in Section 4.5.6, provided Developer is using commercially reasonable efforts to (i) avoid or minimize the impact thereof on traffic flow during High Priority Hours and Mid Priority Hours, (ii) reopen the affected Segment(s) as quickly as possible to traffic during High Priority Hours and Mid Priority Hours;
- (e) A Construction Closure specified, caused or ordered by, and continuing only for so long as required by, the Department or any Governmental Entity (other than in its capacity as a Utility Owner), including Construction Closures caused by a Relief Event described in clause (o), (p) or (q) of the definition of Relief Event, except to the extent such Closure is the result of the negligence, willful misconduct, or breach of applicable Law or contract, by Developer or any Developer-Related Entity;
- (f) A Construction Closure due to a Relief Event described in clause (a) (i), (j), (k), (n), (r), (s), (t), (u) or (v) of the definition of Relief Event, provided Developer is using commercially reasonable efforts to: (i) mitigate the impact of the Relief Event, (ii) reopen the affected Segment(s) as quickly as possible to traffic during High Priority Hours and Mid Priority Hours, and (iii) minimize the impact of Developer's activities to traffic flow during such Hours; or
- (g) A Construction Closure due to any other Relief Event not covered under clause (e) or (f) of this definition of Permitted Construction Closure shall be deemed a Permitted Construction Closure only insofar as Developer's response to such Relief Event is deemed to be Compliance Work and undertaken as Planned Maintenance as provided for in Section 3.5 of Appendix 4-B to the Agreement.

Persistent Developer Noncompliance means:

- (a) Accumulation of assessed Noncompliance Points at or above any of the trigger points set forth in Section 18.2.6.2 of the Agreement; or
- (b) Accumulation of a number of instances of Noncompliance at or above any of the trigger points set forth in Section 18.2.6.3 of the Agreement.

Person means any individual, corporation, joint venture, limited liability company, company, voluntary association, partnership, trust, unincorporated organization or Governmental Entity.

Phase I Construction means all the physical improvements constructed by other parties under contracts 1 through 4 as described in more detail in Section 1 of Division II.:

Phase I Substantial Completion means that the Department both (a) has certified, in its sole discretion, substantial completion of the Phase I Construction such that the Phase I Construction is safe to open for traffic and (b) is able to make available to Developer use of all or substantially all of the Staging Areas shown in Appendix 5-B).

Phase II Construction means all the physical improvements of the Project other than the Phase I Construction, which physical improvements will be constructed by Developer during the Construction Period, as described in more detail in Section 1 of Division II:

Planned Maintenance means O&M Work that has been properly scheduled and executed in accordance with Appendix 4-B or Appendix 7, as applicable, to the Agreement and Section 4 of Division II.

Planned Maintenance Schedule means a schedule, prepared annually and updated by Developer and approved by the Department, showing the times during which Planned Maintenance will be performed and the lanes in each Segment in which such Planned Maintenance will be performed.

Pre-existing Hazardous Materials means Hazardous Materials that exist in, on or under the Project Right of Way prior to the Effective Date.

Pre-existing Hazardous Materials Deductible has the meaning set forth in Section 4.10.2.1.1 of the Agreement.

Presidio Trust means the trust created on November 12, 1996, pursuant to the Presidio Trust Act, Public Law 104-333, codified at 16 U.S.C. 460bb appendix.

Presidio Trust Processing Period means an assumed time period of [] days after the Presidio Trust receives from Developer a complete submittal, including reasonably required documentation, reports, data, analysis and other relevant information, for the Presidio Trust to review and comment on, approve or disapprove, consent to or authorize a submittal, document, activity or other matter for which approval, consent or authorization is required under the terms of the Presidio Trust Right of Entry Agreement or the Programmatic Agreement.

Presidio Trust Right of Entry Agreement means that certain Right of Entry Agreement, entered into July 16, 2009, by and among the Presidio Trust, the Department and SFCTA.

Professional Engineer means a professional engineer as defined in Section 6701 of the California Business and Professions Code licensed in the State, or a partnership, firm or corporation authorized to practice engineering in the State in accordance with Section 6738 of the California Business and Professions Code.

Programmatic Agreement means that certain Programmatic Agreement among FHWA, Department, SFCTA, Presidio Trust, the National Parks Service, the Department of Veterans Affairs, the California State Historic Preservation Officer, the Advisory Council on Historic Preservation and the San Francisco Recreation and Parks Department, for the South Access to the Golden Gate Bridge, Doyle Drive Replacement Project, San Francisco, California.

Project means the entire approximately 1.6 mile Presidio Parkway Project, which is described in detail in Section 1 of Division II. "Project" includes any Upgrades thereto. The Project consists of four construction and operations phases (see definitions of Phase I Construction, O&M During Construction, Phase II Construction and O&M After Construction).

Project Adjusted Costs means those costs and expenses that have actually been incurred by or on behalf of Developer directly in connection with the design, acquisition or construction of the Project, as well as in connection with Renewal Work, less the Milestone Payments actually paid by the Department. Notwithstanding the foregoing, Project Adjusted Costs do not include capitalized interest and other financing costs, professional and advisory fees, Developer overhead and administrative expenses, Redundancy Payments or demobilization costs.

Project Debt means bona fide indebtedness (including mezzanine and subordinated indebtedness) for funds borrowed or for the value of goods or services rendered or received, the repayment of which is secured by one or more Security Documents, and shall include the TIFIA Loan. Project Debt includes principal (including accreted principal), accrued interest (including capitalized interest), customary and reasonable lender, agent, trustee and monoline fees (excluding those monoline fees that would not otherwise have been due and payable if termination under the Agreement had not occurred), costs and expenses payable to Lenders with respect thereto, premiums or reimbursement obligations with respect to any insurance or financial guaranty with respect thereto (excluding those premiums that would not otherwise have been due and payable if termination under the Agreement had not occurred), all payment obligations under any hedging agreements with respect thereto, including current-pay and accreting swaps, lease financing obligations, and Breakage Costs. Project Debt excludes Equity Member Debt and any other indebtedness of Developer or any Equity Member, partner or joint venturer of Developer (or Affiliate thereof) that is secured by anything less than the entire Developer's Interest, such as indebtedness secured only by an assignment of economic interest in Developer or of rights to cash flow or dividends from Developer. Project Debt also excludes any increase in indebtedness, other than an increase in indebtedness incurred due to a Rescue Refinancing or permitted borrowing or funds raised exclusively for Extra Work Costs or Delay Costs, to the extent resulting from an agreement or other arrangement Developer enters into or first becomes obligated to repay after it was aware (or should have been aware, using reasonable due diligence) of the occurrence or prospective occurrence of an event of termination giving rise to an obligation of the Department to pay Termination Compensation, including Developer's receipt of a Notice of Termination for Convenience, a Warning Notice or other notice of Developer Default respecting a Default Termination Event, and Developer's declaration of a Department Default of the type entitling Developer to terminate the Agreement.

Project Debt Termination Amount means:

- (a) All amounts outstanding in respect of the Project Debt; plus
- (b) Without double counting in relation to such Project Debt, all Breakage Costs payable by Developer as a result of prepayment of the outstanding amounts of such Project Debt, subject to Developer and the Lenders mitigating all such costs to the extent reasonably possible; minus
- (c) To the extent it is a positive amount, such amounts under clause (a) and (b) above that constitute or accumulate by reason of default rates of interest, late charges and penalties, including any such items added to principal; minus
- (d) In connection with the calculation of Termination Compensation pursuant to Section 19.3 of the Agreement, to the extent it is a positive amount, the aggregate of all Breakage Costs payable by the Lenders to Developer as a result of prepayment of any outstanding Project Debt.

Project Enhancement means any extensions of, additions to, modifications or improvements to the Project that is not part of the Work.

Project Executive means the individual designated and engaged by Developer and approved in writing by the Department in the position to take overall responsibility for the Project and who will act as a single point of contact on all matters on behalf of Developer.

Project Management Plan means the document approved by the Department, including approved changes, additions and revisions, describing the Work necessary to manage the development, design, construction, operation and maintenance of the Project, and containing the component parts, plans and documentation required under the Contract Documents. The Project Management Plan includes the Quality Plans, the Construction Traffic Control Plan, the Operating Traffic Management Plan, and the O&M Manual.

Project Manager means the individual designated by Developer and approved in writing by the Department in the position to take full responsibility for the prosecution of the Work.

Project Right of Way or **Project ROW** means any real property (which term is inclusive of all estates, easements, leases and other interests in real property, whether temporary or permanent), improvements and fixtures within the lines established by the Right of Way Plans to delineate the outside limits of the Project for (a) Construction Work and (b) O&M Work (both horizontal and, where specified, vertical), as such limits may be adjusted from time to time in accordance with the Contract Documents. The term specifically includes all air space, surface rights and subsurface rights within the horizontal limits of the Project Right of Way to the extent they are subject to an interest held by the Department.

Project Schedule means the logic-based critical path schedule for all D&C Work as set forth in Appendix 2-A to the Agreement, as may be revised and updated in accordance with the Contract Documents.

Proposal means Developer's firm submission titled Response to the Request for Proposals for the Presidio Parkway Project and dated **[INSERT ISSUANCE DATE]**.

Proposal Submission Date means **[INSERT DATE]**.

Proprietary Intellectual Property means Intellectual Property created, used, applied or reduced to practice in connection with the Project or the Work that derives commercial value from its protection as a trade secret under applicable Law or from its protection under patent law.

Protection in Place means any action taken to avoid damaging a Utility which does not involve removing or relocating that Utility, including staking the location of the Utility, exposing the Utility, avoidance of a Utility's location by construction equipment, installing steel plating or concrete slabs, encasement in concrete, temporarily de-energizing powerlines, and installing physical barriers. The term includes both temporary measures and permanent installations meeting the foregoing definition.

Public Records Act means Sections 6250 *et seq.* of the California Government Code, as amended from time to time.

Punch List means an itemized list of Construction Work which remains to be completed after Substantial Completion has been achieved and before Final Acceptance, the existence, correction and completion of which will have no adverse effect on the normal, uninterrupted and safe use and operation of the Project.

Qualifying Utility Agreement means a Utility Agreement between Developer and a Qualifying Utility Owner that meets all of the following requirements:

- (a) Describes the scope of the Utility Adjustment, including each activity to be performed by Developer and the Qualifying Utility Owner relating to such Utility Adjustment;
- (b) Indicates a schedule for the Utility Adjustment that indicates the start date and scheduled duration of the Utility Adjustment, including the duration of each activity to be performed by Developer and the Qualifying Utility Owner; and
- (c) Contains and references a set of plans agreed to by Developer and the Qualifying Utility Owner, including any revisions thereto, for the Utility Adjustment.

Qualifying Utility Owner means a Utility Owner that will perform the Utility Adjustment with its own forces or through separate contractors that are not Developer-Related Entities.

Quality Manager means the individual retained by Developer with the authority and responsibility for quality management system-related activities for all Work, including the establishment and maintenance of, and compliance with the Quality Plan(s).

Quality Plan(s) means the Design Quality Plan and Construction Quality Plan. The Quality Plans are part of the Project Management Plan.

Quarter means a time period comprised of three calendar months. Each Calendar Year contains four Quarters: January – March; April – June; July – September; and October – December.

Quarterly O&M Noncompliances Adjustment means an amount equal to the sum of the O&M Noncompliance Adjustments incurred during a given Quarter and calculated as provided in Appendix 7 to the Agreement.

Quarterly Payment means the dollar amount of the portion of Availability Payment payable by the Department to Developer for a given Quarter, calculated as provided in Section 1 of Appendix 7 to the Agreement.

Quarterly Payment Adjustment means an amount equal to the sum of the Quarterly Unavailability Adjustment and the Quarterly O&M Noncompliances Adjustment and calculated as provided in Appendix 7 to the Agreement.

Quarterly Unavailability Adjustment means an amount equal to the sum of the Hourly Unavailability Adjustments incurred during a given Quarter, calculated as provided in Appendix 7 to the Agreement.

Rating Agency means any of Standard & Poor's Rating Services, a division of The McGraw-Hill Companies, Inc., Moody's Investors Service, Inc., Fitch Investors Service, Inc. or Duff & Phelps, Inc. or any other entity providing similar services and having comparable market recognition, or any of their respective successors.

Redundancy Payments means the payment of all wages earned, accrued unused vacation time, and any other payments required by law or required by the employer's employment agreement with the employees.

Reference Documents means the collection of information, data, documents and other materials that the Department has provided to Developer in connection with the Project or the Work (including those contained in the RFP documents) for general or reference information only and without any warranty as to their accuracy, completeness or fitness for any particular purpose. The Reference Documents are not Contract Documents.

Refinancing means:

- (a) Any amendment, variation, novation or supplement of any Project Debt, Financing Documents, including the Initial Project Debt, and the Initial Financing Documents, that results in a reduced interest rate, an increase of such Project Debt, or a tangible financial benefit to Developer;
- (b) The issuance by Developer of any Project Debt other than the Initial Project Debt, secured or unsecured;
- (c) The disposition of any rights or interests in, or the creation of any rights of participation in respect of, the Project Debt of the Financing Documents, or the creation or granting of any other form of benefit or interest in either the Financing Documents or the Developer's Interest, whether by way of security or otherwise, by Developer; or
- (d) Any other arrangement put in place by Developer or another Person which has an effect similar to the arrangements discussed in clauses (a) through (c) above.

The term Refinancing excludes (i) Equity Transfer or (ii) any sale or transfer of the Equity Members Debt or Equity Members' existing rights and/or interest under the Equity Members Funding Agreements.

Refinancing Gain means the amount calculated as provided in Appendix 12 to the Agreement.

Release of Hazardous Materials means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, surface water, groundwater or indoor or outdoor environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination.

Relief Event means any of the following events, subject to other limitations, requirements and deductibles that may be set forth in the Agreement for such events:

- (a) Force Majeure Event;
- (b) Change in Law;
- (c) Department Change (other than a Discriminatory O&M Change and Non-Discriminatory O&M Change);
- (d) Discriminatory O&M Change;
- (e) Non-Discriminatory O&M Change;

- (f) The Department's failure to perform or observe any of its material covenants or obligations under the Agreement or other Contract Documents (except where such failure is within another defined Relief Event);
- (g) Department-Caused Delay;
- (h) Failure or inability of the Department to make available to Developer (i) from issuance of NTP 2 through the Final Acceptance Date a Project Right of Way parcel as shown in Appendix 5-A or Staging Areas as shown in Appendix 5-B required for the Phase II Construction, except for any failure or inability to make available to Developer any such parcel beyond December 20, 2015 to the extent of the period of delay in the Final Acceptance Date beyond such date not caused by a Relief Event, (ii) throughout the Construction Period any other Project Right of Way parcel as shown in the Right of Way Plans that is within the Construction Period O&M Limits as shown in Appendix 5-C, except for any failure or inability to make available to Developer any such parcel beyond December 20, 2015 to the extent of the period of delay in the Final Acceptance Date beyond such date not caused by of a Relief Event, or (iii) throughout the Operating Period a Project Right of Way parcel as shown in the Right of Way Plans that is within the Operating Period O&M Limits as shown in Appendix 5-C;
- (i) The development or operation of a Business Opportunity in the Airspace or Project Right of Way as set forth in Section 20.2.3 of the Agreement;
- (j) Violation of Law by the Department or a third party that materially and adversely impacts the Project or Developer;
- (k) Performance of work in the Project Right of Way by the Department or any Governmental Entity which work materially disrupts Developer's on-site Work, or failure to perform work required of the Department or any Governmental Entity in the Project Right of Way which failure materially disrupts Developer's on-site Work, in each case excluding any Utility Adjustment Work (or failure to perform Utility Adjustment Work) by a Utility Owner that is not a Qualifying Utility Owner;
- (l) Discovery at, near or on the Project Right of Way as defined in the Right of Way Plans of archeological, paleontological or cultural resources;
- (m) Discovery at, near or on the Project Right of Way as defined in the Right of Way Plans of any species listed as threatened or endangered under the federal or State endangered species act (regardless of whether the species is listed as threatened or endangered as of the Effective Date), excluding any such presence of species known to Developer [30] days prior to the Proposal Submission Date or that would have become known to Developer by undertaking reasonable investigation [30] days prior to the Proposal Submission Date;
- (n) Release of Hazardous Materials by the Department or a third party who is not a Developer-Related Entity, but only to the extent such release (i) occurs after the Effective Date, (ii) is required to be reported to a Governmental Entity, and (iii) renders use of the roadway or construction area unsafe or in breach of applicable Law absent assessment, containment and/or remediation;

- (o) Issuance of a temporary restraining order or other form of injunction or legal order by a court that prohibits prosecution of any portion of the Work;
- (p) Safety Compliance Orders;
- (q) Issuance of a rule, order or directive from the U.S. Department of Homeland Security or any Governmental Entity regarding specific security threats to the Project or the region in which the Project is located or which the Project serves, to the extent such rule, order or directive requires specific changes in Developer's normal design, construction, operation or maintenance procedures in order to comply;
- (r) Pre-existing Hazardous Materials;
- (s) Structural Latent Defects discovered during the three year period after the date of the Baseline Report;
- (t) Delays in obtaining Major Permits by the applicable Major Permits Deadline, or in obtaining from the Presidio Trust, within the Presidio Trust Processing Period, action on a matter for which its prior approval, consent or authorization is required under the terms of the Presidio Trust Right of Entry Agreement or Programmatic Agreement;
- (u) Utility Owner Delays; or
- (v) Discovery of Unknown Utilities affecting the initial Construction Work for the Phase II Construction.

Notwithstanding the foregoing, a "Relief Event" excludes any event or circumstance to the extent caused by the negligence, willful misconduct, breach of contract, or violation of Law or Governmental Approval by any Developer-Related Entity.

Relief Event Delay means a delay to a Controlling Work Item, provided that such delay is solely and directly attributable to a Relief Event and is not concurrent with any other delay which is not caused by a Relief Event.

Renewal Work means maintenance, repair, reconstruction, rehabilitation, restoration, renewal or replacement of any Element within the Operating Period O&M Limits of a type which is not normally included as an annually recurring cost in highway maintenance and repair budgets, that requires a significant amount of time to accomplish and therefore must be coordinated, scheduled and planned well in advance of the work effort, including any resurfacing required during the Operating Period.

Renewal Work Letter of Credit has the meaning set forth in Section 5.7.6.1 of the Agreement.

Renewal Work Plan means the plan prepared by Developer describing the plan, systems, approach, staffing and schedule to perform all Renewal Work as further described in Section 4 of Division II.

Renewal Work Report means the annual report Developer submits to the Department for the Renewal Work as set forth in Section 4 of Division II.

Renewal Work Reserve has the meaning set forth in Section 5.7.1.1 of the Agreement.

Renewal Work Schedule means the schedule for Renewal Work to be prepared and updated by Developer pursuant to Section 4 of Division II.

Required Minimum Insurance Policies has the meaning set forth in Section 2.2 of Appendix 9 to the Agreement.

Rescue Refinancing means any Refinancing that: (a) occurs due to the failure or imminent failure of Developer to comply with any material financial obligation under any Funding Agreement or (b) is undertaken expressly to facilitate the cure of any other material default or event of default by Developer under the Financing Documents and does not result in an increase in the Equity IRR beyond the Original Equity IRR. Notwithstanding the foregoing, no Rescue Refinancing shall result in an actual or potential increase of the Project Debt Termination Amount by more than **[10]**%.

Reserve Funds means additional State, local or federal funding programmed and available for use on the Project in **[Fiscal Years XXXX, XXXX and XXXX]** in the following amounts:

- (a) Fiscal Year **[XXXX]** - US\$**[XXXXXXXXXX]**;
- (b) Fiscal Year **[XXXX]** - US\$**[XXXXXXXXXX]**; and
- (c) Fiscal Year **[XXXX]** - US\$**[XXXXXXXXXX]**.

The Department may adjust the amount and timing of these Reserve Funds in its sole discretion.

Resident Engineer means a licensed engineer, acting as a duly Authorized Representative of the Department, responsible for the Department's activities respecting the day-to-day D&C Work.

Residual Life means, for an Element, the period remaining until the Element will next require reconstruction, rehabilitation, restoration, renewal or replacement. The Residual Life of an Element would be equal to its originally calculated Useful Life less its Age if (a) the Element has performed in service in the manner and with the levels of traffic and wear and tear originally expected by Developer and (b) Developer has performed the type of Routine Maintenance on the Element which is normally included as an annually recurring cost in highway (and associated equipment) maintenance and repair budgets, and as a result thereof the Element complies throughout its originally calculated Useful Life and with each applicable performance requirement set forth in Section 4 of Division II. The Residual Life of an Element would be different from its originally calculated Useful Life minus its Age if any of the foregoing conditions is not true.

RFP or **Request for Proposals** has the meaning set forth in Recital C of this Agreement.

RFQ or **Request for Qualifications** has the meaning set forth in Recital B of this Agreement.

Right of Way Plans refer to the graphic depictions of the Project Right of Way, Staging Areas, Construction Period O&M Limits and Operating Period O&M Limits set forth in Appendix 5 to the Agreement.

Roadbed means (whether capitalized or not) that area between the intersection of the upper surface of the Roadway and the side slopes or curb lines. The roadbed rises in elevation as each increment or layer of Subbase, Base, surfacing or Pavement is placed. Where the medians are so wide as to include areas of undisturbed land, a Divided Highway is considered as including two separate roadbeds.

Roadway means (whether capitalized or not) that portion of the Highway included between the outside lines of sidewalks, or curbs, slopes, ditches, channels, waterways, and including all the appertaining structures, and other features necessary to proper drainage and protection.

Routine Maintenance means maintenance activities that are scheduled in advance and occur on a regular basis, such as weekly, monthly, quarterly, semi-annually or annually which are normally included as an annually recurring cost in highway (and associated equipment) maintenance and repair budgets.

ROW Acquisition Schedule means the schedule for acquisition of Project Right of Way defined in the Right of Way Plans, as set forth in Section 2 of Division II.

Safety Compliance means any and all improvements, repair, reconstruction, rehabilitation, restoration, renewal, replacement and changes in configuration or procedures respecting the Project to correct a specific safety condition of the Project that the Department or a Governmental Entity has reasonably determined to exist by investigation or analysis (including if the condition exists despite prior compliance with Safety Standards but excluding a condition or risk directly and primarily caused by compliance with Safety Standards).

Safety Compliance Order means a written order or directive from the Department to Developer to implement Safety Compliance.

Safety Plan means the plans and procedures prepared by Developer and included in the O&M Manual that are to be implemented to protect the safety of the public and Developer's employees when performing any O&M Work.

Safety Standards means those provisions of the Technical Requirements that the Department considers to be important measures to protect public safety or worker safety. As a matter of clarification, provisions of the Technical Requirements primarily directed at durability of materials or equipment, where the durability is primarily a matter of life cycle cost rather than protecting public or worker safety, are not Safety Standards.

Scaffolding means (whether capitalized or not) an elevated work platform used to support workmen, materials and equipment, but not intended to support the structure.

Schedule of Values means the schedule of values included as Appendix 2-I to the Agreement.

Scheduled Substantial Completion Date means the scheduled date for Substantial Completion set forth in the initial Project Schedule included in Appendix 2-A to the Agreement, as the same may be adjusted in accordance with the Agreement.

Secretary means the Secretary of Business, Transportation and Housing, State of California Department of Transportation, acting directly or through an assistant or other representative authorized by him or her.

Section 143 has the meaning set forth in **Recital B** of the Agreement.

Security Document means any mortgage, deed of trust, pledge, lien, indenture, trust agreement, hypothecation, assignment, collateral assignment, financing statement under the Uniform Commercial Code of any jurisdiction, security instrument or other charge or encumbrance of any kind, including any lease in the nature of a security instrument, given to any Lender as security for Project Debt or Developer's obligations pertaining to Project Debt and encumbering Developer's Interest, or an interest in Developer.

Segment means each of (a) the northbound Traffic Lanes of the Project within the Operating Period O&M Limits, (b) the southbound Traffic Lanes of the Project within the Operating Period O&M Limits, and (c) the ramps of the Project within the Operating Period O&M Limits, each of which shall include all the ancillary facilities, systems, equipment and Common Elements for such segment.]

Segment Weighting Factor means the applicable number determined using Table D in Section 5 of **Appendix 7** to the Agreement and used in the calculation of the Hourly Unavailability Adjustment.

Seismic Event means (a) an earthquake in excess of magnitude of 3.5 on the Richter Scale or (b) a tidal wave, which, in both cases, directly impacts the physical improvements of the Project.

Service Line means (a) a Utility line, the function of which is to directly connect the improvements on an individual property to another Utility line located off such property, which other Utility line connects more than one such individual line to a larger system, or (b) any cable or conduit that supplies an active feed from a Utility Owner's facilities to activate or energize the Department's or a local agency's lighting and electrical systems, traffic control systems, communications systems and/or irrigation systems.

Shop Drawings means all working, shop and erection drawings, associated trade literature, calculations, schedules, manuals and similar documents prepared or furnished by Developer to define some portion of the Work. The type of Work includes both Permanent Works and Temporary Works as appropriate to the Project.

Shoring means (whether capitalized or not) a component of Falsework such as horizontal, vertical or inclined support members..

Shoulder means (whether capitalized or not) the portion of the Roadway contiguous with the traveled way for accommodation of stopped vehicles, for emergency use, and for lateral support of Base and surface courses.

Site means the Project Right of Way, Staging Areas and any other temporary rights or interests that Developer may acquire in connection with the Project, including for construction, staging, lay down, storage, stockpiling and borrow areas.

Sound Barrier Walls or **Sound Barriers** or **Noise Walls** means the walls to be designed, constructed and maintained by Developer for noise abatement measures in accordance with the Technical Requirements.

Special Erection Equipment means and includes launching gantries, beam and winch equipment, form travelers, stability towers, strong-backs, erection trusses, launching noses or similar items made purposely for construction of the structure. It does not apply to commonly available proprietary construction equipment such as cranes.

Specialty Engineer means the initiator or producer of Shop Drawings regardless of whether that party is normally the Engineer of Record or specialty Professional Engineer.

Staging Areas means temporary areas, lands or properties of the Trust as shown in Appendix 5-B to the Agreement, made available to the Developer for temporary construction activities such as staging, lay down, storage, stockpiling, and equipment parking activities.

Starting Insurance Benchmarking Premiums has the meaning set forth in Section 2.4 of Appendix 9 to the Agreement.

State means the State of California.

Statement of Qualifications means Developer's firm submission titled Statement of Qualifications to Design, Build, Finance, Operate and Maintain the Presidio Parkway Project, through a Comprehensive Lease Development Agreement and dated March 11, 2010.

Structural Latent Defects means latent defects in structural components (including viaducts and tunnels) of the Phase I Construction that are caused by design or construction errors based on codes, standards and specifications in effect at the time of the original design and construction of the Phase I Construction.

Subbase means (whether capitalized or not) the layer of specified material of planned thickness between a Base and the Basement Material.

Subgrade means (whether capitalized or not) the portion of the Roadbed immediately below the Base course or Pavement, including below the curb and gutter, valley gutter, shoulder and driveway Pavement. The subgrade limits ordinarily include those portions of the Roadbed shown in the Plans to be constructed to a design bearing value or to be otherwise specially treated. Where no limits are shown in the Plans, the subgrade section extends to a depth of 12 inches below the bottom of the Base or Pavement and outward to six inches beyond the Base, Pavement, or curb and gutter.

Submittal means any document, work product or other written or electronic end product or item required under the Contract Documents to be delivered or submitted to the Department. Notwithstanding the foregoing, an invoice submitted by Developer seeking payments pursuant to the Agreement is not a Submittal.

Substantial Completion means the occurrence of all events and satisfaction of all conditions set forth in Section 4.9.2.1 of the Agreement, as and when confirmed by the Department's issuance of a notice in accordance with the procedures and within the time frame established in Section 4.9.2 of the Agreement.

Substantial Completion Date means the date upon which Developer achieves Substantial Completion.

Substituted Entity means any Person selected by Lenders and approved by the Department in accordance with Section 12.5 of the Agreement to perform all or a portion of Developer's obligations and to succeed to the Developer's Interests.

Substructure means (whether capitalized or not) all of that part of a Bridge structure below the Bridge seats, including the parapets, backwalls, and wingwalls of abutments.

Superstructure means (whether capitalized or not) the entire Bridge structure above the Substructure, including anchorage and anchor bolts, but excluding the parapets, backwalls, and wingwalls of abutments.

Supplemental Agreement means a written agreement between Developer and the Department, signed by the surety (if applicable), modifying the Contract Documents within the limitations set forth in the Contract Documents.

Supplier means any Person not performing work at or on the Site which supplies machinery, equipment, materials, hardware, software, systems or any other appurtenance to the Project to Developer or to any Contractor in connection with the performance of the Work. Persons who merely transport, pick up, deliver or carry materials, personnel, parts or equipment or any other items or persons to or from the Site shall not be deemed to be performing Work at the Site.

Surety means each properly licensed surety company, insurance company or other Person approved by the Department, which has issued any Payment Security or Performance Security in the form of a bond.

Taxes means federal, State, local or foreign income, gross receipts, sales, use, excise, transfer, consumer, license, payroll, employment, severance, stamp, business, occupation, premium, windfall profits, environmental (including taxes under Section 59A of the Internal Revenue Code of 1986, as amended), customs, permit, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, registration, value added, alternative or add-on minimum, estimated or other taxes, levies, imposts, duties, fees or charges imposed, levied, collected, withheld or assessed at any time, whether direct or indirect, relating to, or incurred in connection with, the Project, the performance of the Work or act, business, status or transaction of Developer, including any interest, penalty or addition thereto, and including utility rates or rents, in all cases whether disputed or undisputed.

Technical Requirements means Volume II of the Contract Documents, consisting of Sections 1 through 5 of Division II, as such provisions may be changed, added to or replaced pursuant to the Agreement, together with such documents as may be incorporated into Volume II by reference therein.

Technology Enhancements means modifications, additions, refinements, substitutions, revisions, replacements and upgrades made to or in place of enforcement systems deployed on or for the Project or to any other computer systems or other technology used for the operation of the Project, or to any related documentation, that accomplish incidental, performance, structural, or functional improvements. The term specifically includes modifications, updates, revisions, replacements and upgrades made to or in place of software or any related documentation that correct errors or safety hazards or support new models of computer hardware with which the

software is designed to operate. Technology Enhancements also include such new models of computer hardware.

Temporary Works means (whether capitalized or not) any temporary works and structures necessary for the construction of the Permanent Works. This includes Falsework, Formwork, Scaffolding, Shoring, temporary earthworks, sheeting, cofferdams, special erection equipment and the like.

Term has the meaning set forth in Section 2.2.1 of the Agreement.

Termination by Court Ruling has the meaning set forth in Section 19.5.3 of the Agreement.

Termination Compensation means the measure of compensation, if any, owing from the Department to Developer upon termination of the Agreement prior to the stated expiration of the Term, as set forth in Section 16.1.2.12 or Article 19 of the Agreement.

Termination Date means (a) the date of expiration of the Term or (b) if applicable, the Early Termination Date.

Termination for Convenience has the meaning set forth in Section 19.1.1 of the Agreement.

Terrorism means activities directly against or directly affecting the Project or the Work:

- (a) That involve the following or preparation for the following:
 - i. Use or threat of force or violence; or
 - ii. Commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and
- (b) When one or both of the following applies:
 - i. The effect is to intimidate or coerce a Governmental Entity or the civilian population or any segment thereof, or to disrupt any segment of the economy; or
 - ii. It appears that the intent is to intimidate or coerce a Governmental Entity, or to further a political, ideological, religious, social or economic objective or to express (or express opposition to) a philosophy or ideology.

Third-Party Claims means any and all claims, disputes, disagreements, causes of action, demands, suits, actions, judgments, investigations or proceedings brought by a Person that is not a Party with respect to damages, injuries, liabilities, obligations, losses, costs, penalties, fines or expenses (including attorneys' fees and expenses) sustained or incurred by such Person.

Tiered Pre-existing Hazardous Materials Deductible has the meaning set forth in Section 4.10.2.1.2 of the Agreement.

TIFIA Loan means a loan from the United States Department of Transportation pursuant to the Transportation Infrastructure Finance and Innovation Act of 1998 (“TIFIA”), § 1501 *et seq.* of Public Law 105-178, as amended by the TEA 21 Restoration Act, Public Law 105-206 and the Safe, Accountable, Flexible, Effective Transportation Equity Act, A Legacy for Users, Public Law 109-59 (the “Act”), codified as 23 U.S.C. §§ 601 *et seq.*

Time Weighting Factor means the applicable number determined using Table E in Section 5 of Appendix 7 to the Agreement and used in the calculation of the Hourly Unavailability Adjustment.

Traffic Incident Management Plan has the meaning given in Section 4 of Division II.

Traffic Lane means (whether capitalized or not) that portion of a Traveled Way for the movement of a single line of vehicles.

Traffic Management Plan means either of the Construction Traffic Control Plan or the Operating Traffic Management Plan. “**Traffic Management Plans**” means both such plans.

Traveled Way means (whether capitalized or not) the portion of the Roadway providing for the movement of vehicles, including Auxiliary Lanes but exclusive of shoulders.

UDBE/DBE Affirmative Action Program Plan means the UDBE/DBE plan submitted by Developer and approved by the Department, which is attached as Appendix 18 to the Agreement.

UDBE/DBE Program means the Underutilized Disadvantaged Business Enterprise Program adopted pursuant to [] and the Department Disadvantaged Business Enterprise Program adopted pursuant to 49 CFR Part 26.

Unavailability Event means either (a) a Closure that is not a Permitted Closure, and/or (b) an O&M Noncompliance Event that should have been cured but was not so cured during the relevant cure period (if any) and is neither (i) excused under Section 9.2.5.2 of the Agreement nor (ii) pertains exclusively to a Traffic Lane or Segment that is subject to a Permitted Closure to which such O&M Noncompliance Event is directly related. When there is a cure period associated with an O&M Noncompliance Event, and such O&M Noncompliance Event is not remedied within that cure period, then such O&M Noncompliance Event shall be deemed to have commenced as an Unavailability Event from the moment it first occurred. For purposes of clarification, this means that when the Unavailability Factors are determined, there will be deemed to be no cure period if the O&M Noncompliance Event is not remedied within the cure period provided (if any).

Unavailability Factors means the Unavailability Factors set out in Table A of Section 5 of Appendix 7 to the Agreement.

Undesirable Materials means any excavated or buried materials that are not Hazardous Materials but which due to the lack of engineering or other desirable properties, have no inherent value, cannot be utilized or sold, and must be handled, transported, and disposed. Undesirable Materials include garbage, trash, or other discarded items, muck or organic material. The term “Undesirable Materials” excludes archeological, paleontological or cultural resources.

Undesirable Materials Management means procedures and requirements to address Undesirable Materials conditions encountered, impacted, caused by or occurring in connection with the Project, Project Right of Way or the Work, as well as investigation and removal of such

Undesirable Materials where required. Undesirable Materials Management may include sampling, stock-piling, storage, backfilling in place, asphalt batching, recycling, treatment, clean-up, removal, transportation and/or off-site disposal of Undesirable Materials, whichever approach is effective, most cost-efficient and authorized under applicable Law and Governmental Approvals.

Unilateral Payment means a payment of money made to Developer by the Department for sums the Department determines to be due to Developer for performance of the Work, and whereby Developer by acceptance of such payment does not waive any rights Developer may otherwise have against the Department for payment of any additional sums Developer claims are due for the Work.

Unknown Utility means a Utility, other than a Service Line, that meets one of the following criteria::

- (a) The Utility Information incorrectly indicates that the subject Utility does not exist anywhere within the boundary lines of the Project Right of Way;
- (b) The Utility Information incorrectly indicates the centerline location of the subject Utility by more than [] feet from the centerline of the actual location of the subject Utility; or
- (c) Both the Utility Information and public and private records incorrectly indicate that the subject Utility is abandoned (i.e., nonexistent except on paper, or existent but no longer active for any type of Utility use).

If any discrepancy exists between the information provided by one component of the Utility Information (or public and/or private records where relevant) and that provided by any other component of the Utility Information (or public and/or private utility records where relevant), only the more accurate information shall be relevant for purposes of this definition.

Upgrades means alterations, improvements, modifications, technology enhancements or changes that Developer makes to the Project, as originally designed and constructed, at any time after the Substantial Completion Date, including as part of the Renewal Work.

Useful Life means, for an Element, the period following its first installation, or following its last reconstruction, rehabilitation, restoration, renewal or replacement, until the Element will next require reconstruction, rehabilitation, restoration, renewal or replacement.

User(s) means the traveling public and any others who use the Project.

Utility(ies) or utility(ies) means a privately, publicly, or cooperatively owned line, facility, or system for transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with the highway drainage, and other similar commodities, including wireless telecommunications, television transmission signals and publicly owned fire and police signal systems, which directly or indirectly serve the public. However, the term "Utility" or "utility" excludes (a) streetlights and traffic signals and (b) ITS and IVHS facilities. The necessary appurtenances to each Utility facility shall be considered part of such Utility. Without limitation, any Service Line connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

Utility Adjustment means each relocation (temporary or permanent), abandonment, Protection in Place, removal (of previously abandoned Utilities as well as of newly abandoned Utilities), replacement, reinstallation, and/or modification of existing Utilities necessary to accommodate construction, operation, maintenance and/or use of the Project or the Work; provided, however, that the term “Utility Adjustment” shall not refer to any of the work associated with facilities owned by any railroad. The Utility Adjustment Work for each crossing of the Project Right of Way by a Utility that crosses the Project Right of Way more than once shall be considered a separate Utility Adjustment. For any Utility installed longitudinally within the Project Right of Way, the Utility Adjustment Work for each continuous segment of that Utility located within the Project Right of Way shall be considered a separate Utility Adjustment.

Utility Adjustment Work means all efforts and costs necessary to accomplish the required Utility Adjustments during the Construction Period, including all coordination, design, design review, permitting, construction, inspection and maintenance of records, whether provided by the Department, by Developer or by the Utility Owners. The term also includes any reimbursement of Utility Owners that is Developer’s responsibility pursuant to Section 4.5 of the Agreement.

Utility Agreement means an agreement between Developer [or the Lead Contractor] and a Utility Owner that provides information and terms affecting the Utility Adjustment; such an agreement may be general or comprehensive or may address only certain aspects of a Utility Adjustment.

Utility Enhancement means a Betterment or a Utility Owner Project, as referenced in Section 4.5.5 of the Agreement.

Utility Information means the information regarding Utilities included in the Reference Documents, together with any other information the Department provided to Developer prior to the Proposal Submission Date with regard to identification of Utilities. The Utility Information includes survey information regarding existing Utilities; Utility relocation maps included as an overlay on the survey, and as-built maps for existing Utilities. In the event of any conflict within the various components of the Utility Information, the more accurate information will prevail.

Utility Owner or Utility Agency Owner (UAO) means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative utilities, and municipalities and other governmental agencies).

Utility Owner Delay means a Delay directly attributable to a Qualifying Utility Owner in performing its obligations under a Qualifying Utility Agreement.

Utility Owner Project means the design and construction by or at the direction of a Utility Owner (or by Developer) of a new Utility or the modification, upgrading, relocation or expansion of an existing Utility other than as part of a Utility Adjustment. Betterments are not Utility Owner Projects. Utility Owner Projects are entirely the financial obligation of the Utility Owner.

Vibration Monitoring Plan means the plan required under Section 3 of Division II for monitoring and recording vibration levels produced by equipment used on the Project.

Volume II means the Technical Requirements.

Warning Notice means a written notice that the Department delivers to the Collateral Agent and Developer in accordance with Section 18.2.8 of the Agreement.

Work means all of the work and services required to be furnished, performed and provided by Developer under the Contract Documents, including all administrative, design, engineering, construction, Utility Adjustment, financing, payment to third parties, support services, operations, maintenance and management services, except for those efforts which such Contract Documents expressly specify will be performed by Persons other than Developer-Related Entities.

[END OF DEFINITIONS]

Appendix

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2 Developer's Proposal Commitments

- 2-A Project Schedule**
- 2-B Original Financial Model**
- 2-C Financial Model**
- 2-D Preliminary Corridor Master Plan**
- 2-E Management / Administration**
- 2-F Renewal Work Reserve**
- 2-G Operations and Maintenance**
- 2-G(1) Operations and Maintenance Plan**
- 2-G(2) System Integration Plan**
- 2-H Equity Members, Contractors and Key Personnel Commitment**
- 2-I Schedule of Values**
- 2-J Termination for Convenience Calculation Method**
- 2-K Equal Employment Opportunity Certification**
- 2-L UDBE/DBE Certification**
- 2-M Buy America Certification**
- 2-N Use of Contract Funds for Lobbying Certification**
- 2-O Debarment and Suspension Certification**
- 2-P Schedule of Technical Proposal Adjustments**
- 2-P(1) Roadway**
- 2-P(2) Structures**
- 2-P(3) Drainage**
- 2-P(4) Management / Administration**
- 2-P(5) Operations and Maintenance**
- 2-Q Schedule of Design Adjustments**

UNDER DEVELOPMENT

Appendix

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3 Form of Lease



PROJECT LEASE
for the
PRESIDIO PARKWAY PROJECT
Between
California Department of Transportation
and
[XXXXXXXXXXXXXXXXXXXX]
Contract # [XXXXXX]

Dated [XXXXXXX]

PROJECT LEASE Presidio Parkway Project

This lease (the "Lease") is made and entered into as of _____, 20____, by and between the **CALIFORNIA DEPARTMENT OF TRANSPORTATION**, a public agency of the State of California ("Department"), and _____, a _____ ("Developer").

RECITALS

A. Department and Developer have entered into that Concession Agreement, Presidio Parkway Project dated as of _____, 20____ (the "Agreement"). In the Agreement, to which a form of this lease constitutes Appendix 3, Department confers upon Developer certain rights to finance, develop, design, acquire, construct, operate and maintain the Project described therein.

B. Pursuant to the Agreement, Developer has constructed the Project on the Project Right of Way described below, to which entry and/or other rights necessary for construction of the Project were granted by Department to Developer pursuant to the Agreement.

C. Department intends to lease the Project and the Project Right of Way, subject to restrictions in Section 1.2, to Developer, and Developer desires to lease the Project and the Project Right of Way from Department, on the terms and conditions provided herein.

D. This Lease, together with all exhibits hereto, as originally executed or as it may from time to time be supplemented, modified or amended, is hereinafter referred to as the "Lease".

ARTICLE I

LEASE, PREMISES, TITLE AND TERM

Section 1.1. Lease of Premises. Department hereby leases, lets, demises and rents to Developer, and Developer hereby leases and rents from Department, all the real property described in Exhibit A attached hereto, together with all the improvements now or hereafter located thereon owned by Department, including the portion of the Project thereon, subject to the exclusions and reservations set forth in Section 1.2 (the "Premises"), in accordance with the terms described herein. Notwithstanding the foregoing, with respect to all portions of the Premises for which the Department holds an easement, right of entry, license or other property interest that is not a fee interest, this Lease constitutes only a licensing or sublicensing from the Department to Developer of the Department's property interest, and all words of lease, leasehold estate, possession or control set forth herein shall be deemed to be a licensing or sublicensing with respect to such portions of the Premises.

Section 1.2. Exclusions and Reservations.

(a) The Premises, and Developer's leasehold estate hereunder, specifically exclude any and all Airspace. There are hereby reserved to Department all rights to own,

lease, sell, assign, transfer, utilize, develop or exploit the Airspace for purposes of pursuing Business Opportunities to the extent permitted under, and subject to the terms of, Section 20.2 of the Agreement; and Developer shall not engage in any activity respecting or infringing upon the Airspace. Department hereby reserves a non-exclusive easement over the Premises for access to and from the Airspace for development, maintenance, repair, replacement, operation, use and enjoyment of the Airspace for such purpose. (Airspace shall have the meaning provided in the Agreement.)

(b) Department reserves the right to enter upon, possess, control and utilize the Premises with or without payment of compensation to Developer to the extent and only to the extent specifically permitted in the Contract Documents.

(c) Department reserves the right to grant to other parties utility and other permits and easements and modifications thereto and rights of use to the extent and only to the extent provided in Sections 4.5.5 and 5.2.6 of the Agreement.

Section 1.3. Title. Fee title to the Premises, or other property interest obtained by Department in the Premises, as the case may be, is and at all times shall remain vested in Department, subject to Developer's leasehold estate under this Lease.

Section 1.4. Term.

(a) The term of this Lease shall commence upon the commencement of the Operating Period and shall continue until the earlier of (a) [33] years after the Effective Date, or (b) the termination of the Agreement as provided therein.

(b) The term of this Lease is subject to earlier termination in accordance with the Agreement. Termination of the Agreement in accordance with its terms shall automatically result in termination of this Lease, as provided in Section 19.6 of the Agreement.

(c) Any extension of the term of the Agreement shall automatically extend the term of this Lease so that the expiration date of the term of each is the same.

(d) Developer agrees and acknowledges that neither the signing of this Lease nor its expiration or earlier termination for any reason shall entitle Developer to assistance under California relocation assistance statutes and regulations, and any amendments thereto, or under the Uniform Relocation and Assistance and Real Property Acquisition Policies Act, as amended, 42 U.S.C. Sections 4651 et seq. and any amendments thereto.

ARTICLE II

RENT, TAXES, OTHER CHARGES

Section 2.1. Rent. As consideration for the Premises, Developer shall perform its obligations under the Agreement throughout the Term.

Section 2.2. Taxes. The terms of the Agreement shall govern allocation of Liability for imposition of any real property or possessory interest tax on Developer's interest in the Premises or any part thereof by any Governmental Entity.

Section 2.3. Other Charges. Department shall have no liability with respect to any water, electric, gas, and other lighting, heating, power and utility charges accruing or payable in

connection with Developer's use of the Premises during the term of this Lease, other than as payable under the Agreement in connection with a Relief Event .

ARTICLE III

USE

Section 3.1. Use. During the term of this Lease, Developer shall use the Premises only for the purposes of performing the Work and holding the Project open and available for public use as a highway Project. Developer's right to perform the Work and hold the Project open and available for public during the term of this Lease is hereby specifically permitted, authorized and granted by Department. Such use shall be in accordance with and subject to the terms, provisions, conditions and limitations set forth in the Contract Documents.

Section 3.2. Mechanic's Liens.

(a) Developer acknowledges and agrees that neither Department nor Department's right, title and interest in and to the Project and Project Right of Way may or shall be subject to claims or liens for labor or materials in any way arising out of or relative to Developer's activities, including Design Work and Construction Work.

(b) In the event any lien for labor or materials is recorded upon Department's interest in the Premises, Developer shall, within 60 days after obtaining knowledge thereof:

(i) Record a valid release of lien;

(ii) Procure and record a bond in such form and amount and issued by such surety as is required by applicable Laws to release Department's interest in the Premises from the lien and from any action brought to foreclose the lien; or

(iii) Deposit with a third party escrow agent reasonably acceptable to Department sufficient cash to cover the amount of the subject lien claim, including interest and costs; under irrevocable, binding authorization and instructions for the escrow agent to pay out of such deposit to any subsequent judgment holder the amount of any judgment arising from litigation with regard to the subject lien. The giving of any contrary instructions by Developer shall be strictly prohibited and constitute a default by Developer hereunder.

ARTICLE IV

ASSIGNMENT, SUBLETTING AND CHANGE IN CONTROL

Section 4.1. Assignment by Developer.

(a) Developer shall not voluntarily or involuntarily sell, assign, convey, transfer, pledge, mortgage or otherwise encumber its interests in this Lease or the Premises except to the extent specifically permitted under Article 23 of the Agreement.

(b) Developer shall not sublease, sublicense or grant any other special occupancy or use of the Premises to any other Person except to the extent specifically permitted under Article 23 of the Agreement.

(c) Developer shall not voluntarily or involuntarily cause, permit or suffer any Equity Transfer or Change of Control except to the extent specifically permitted under Section 13.1 of the Agreement.

(d) Any sale, assignment, conveyance, transfer, pledge, mortgage, encumbrance, sublease or grant of other special occupancy or use, and any Equity Transfer or Change of Control, in violation of this provision shall be null and void *ab initio* and the Department, at its option, may declare any such attempted action to be a Developer Default.

Section 4.2. Assignment by Department. Department may transfer and assign its rights, title and interests in the Agreement, this Lease and other Contract Documents as provided in Section 23.3 of the Agreement.

Section 4.3. Notice and Assumption. Assignments and transfers of Developer's Interest or the Department's interest permitted under this Article IV or otherwise approved in writing by the Department or Developer, as applicable, shall be effective only upon receipt by the non-assigning Party of written notice of the assignment or transfer and a written instrument executed by the transferee, in form and substance reasonably acceptable to the non-assigning Party, in which the transferee, without condition or reservation, assumes all of Developer's or the Department's (as the case may be) obligations, duties and liabilities under this Lease.

ARTICLE V

ENCUMBRANCE AND LENDER RIGHTS

Section 5.1. Funding Agreements and Security Documents. The rights of Developer to mortgage, pledge, hypothecate, deed in trust or assign to any Lender Developer's interest in the leasehold estate created by this Lease, are set forth in, and subject to the terms and conditions of, Article 15 of the Agreement.

Section 5.2. Lenders' Rights. Any Lender that holds a Funding Agreement and Security Document and satisfies the conditions and limitations set forth in Section 12.1 of the Agreement shall have and retain the rights specified in Article 12 of the Agreement and in the Direct Agreement, which rights, including Lender third party beneficiary rights, are, without duplication, applicable to this Lease.

ARTICLE VI

QUIET ENJOYMENT

Section 6.1. Quiet Enjoyment. Except as expressly provided otherwise by, and subject to all the terms and conditions of, this Lease and the other Contract Documents, Department covenants that (a) Developer may quietly and peaceably hold, occupy, use and enjoy the Premises for the Term without ejection or interference by Department or any Person claiming by, through or under Department, and (b) Department will protect and defend Developer's right to possession, control and operation of the Premises as provided in this Lease and Contract Documents against the claims of any Person claiming by, through or under Department.

Section 6.2. Right of Entry. Developer shall permit Department and its authorized agents, employees, representatives, contractors and subcontractors to enter upon the

Premises for any purpose relating to Department's rights or obligations under the Contract Documents or under any other circumstances specified in this Lease and/or the other Contract Documents, including but not limited to the following:

(a) Entry upon the Premises to monitor, inspect and audit the same and Developer's activities as provided in the Contract Documents; and

(b) Department's right to enter upon the Premises in the exercise of any of its remedies under of the Agreement or upon effective termination of the Agreement.

No such exercise of the right of entry or loss of use of the Premises by reason thereof shall be compensable, except to the extent of any compensation that may be owing pursuant to the Agreement due to a Relief Event or Termination Compensation that may be owing pursuant to the Agreement.

ARTICLE VII

DEFAULTS AND REMEDIES

Section 7.1. Events of Default. The events constituting a default of Developer under this Lease shall consist of:

(a) Failure by Developer to timely pay to Department monies due and payable to Department under this Lease;

(b) Failure by Developer to observe and perform any covenant, term or condition required to be observed or performed by Developer under this Lease; and

(c) Each and every other Developer Default set forth in Section 18.1.1 of the Agreement.

For each of the above events constituting a default of Developer under this Lease, Developer shall be entitled to notice of default and opportunity thereafter to cure to the extent provided in the Agreement.

Section 7.2. Remedies of Department. Department's rights and remedies with respect to any default by Developer under this Lease shall be exclusively governed by the Agreement. In no event shall Department have the right to terminate this Lease prior to termination of the Agreement in accordance with its terms.

Section 7.3. No Double Recovery. The double counting of a remedy because a default is simultaneously a default under this Lease and the Agreement is contrary to the intent of the Parties.

ARTICLE VIII

SURRENDER ON TERMINATION

Section 8.1. Surrender. On the Termination Date, this Lease shall terminate and Developer shall surrender possession and control of the Premises to Department in accordance with all provisions of the Contract Documents, including but not limited to Sections 5.9 and 5.10 and Article 19 of the Agreement.

Section 8.2. Extinguishment of Interests.

(a) Expiration of the Term shall automatically cause, as of the expiration date, the complete reversion to the Department, and cessation, of the Developer's Interest, at no charge to the Department, but subject to Section 19.6.4.5 of the Agreement and without prejudice to any Claim of liability pursuant to Section 19.8.3 of the Agreement.

(b) Early termination of this Lease and the Agreement shall automatically cause, as of the Termination Date, the complete reversion to the Department, and cessation, of the Developer's Interest, except for its right to Termination Compensation.

(c) Automatically upon either such reversion and cessation of Developer's Interest, the Project and the Premises shall be and remain free and clear of any lien, encumbrance or other claim of record created, permitted or suffered by Developer or anyone claiming by, through or under Developer, including the liens, pledges, assignments, collateral assignments, security interests and encumbrances of any and all Financing Documents. In order to confirm the foregoing, at the Department's request, Developer shall promptly obtain and deliver to the Department reconveyances, releases and discharges of all Security Documents, executed by the Lenders in proper form for recording or filing (as appropriate), but no such reconveyances, releases and discharges shall be necessary to the effectiveness of the foregoing.

ARTICLE IX

MISCELLANEOUS

Section 9.1. Relationship of Parties. The relationship of Developer to Department under this Lease shall be one of lessee to lessor, or licensor to licensee, as applicable, and not of agent, partner, joint venturer or employee; and Department shall have no rights to direct or control the activities of Developer or any Developer-Related Entity. Officials, employees and agents of Department, including its Authorized Representative, shall in no event be considered employees, agents, partners or representatives of Developer or any Lender.

Section 9.2. Waiver. All the provisions respecting waiver of rights, obligations and remedies set forth in Section 25.2 of the Agreement are hereby incorporated herein by reference and made a part hereof.

Section 9.3. Third Parties. Nothing in the provisions of this Lease is intended to create duties or obligations to or rights in third parties not a party to this Lease, except for Lenders to the extent provided herein and in the Agreement, or to affect the legal liability of either Party by imposing any standard of care respecting duties and obligation different from the standard of care imposed by Law.

Section 9.4. Notices. All notices, authorizations and other communications required under this Lease between Department and Developer shall be given as provided in Section 25.9 of the Agreement.

Section 9.5. Agreement Controls. The provisions of the Agreement shall apply to this Lease in the same manner as to the Agreement and are incorporated herein by reference. All capitalized terms used but not defined herein shall have the respective meanings given them in the Agreement.

Section 9.6. Successors and Assigns. This Lease shall be binding upon and shall inure to the benefit of Department and Developer and their permitted successors, assigns and legal representatives.

Section 9.7. No Brokers. Each Party represents and warrants that it has not dealt with any real estate broker or agent or any finder in connection with this Lease.

Section 9.8. Disputes and Governing Law and Venue. All Claims and Disputes arising under this Lease shall be resolved according to Article 24 of the Agreement. This Lease shall be governed and construed in accordance with the laws of the State of California applicable to contracts executed and to be performed within such State.

Section 9.9 Counterparts. This instrument may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Section 9.10. Severability. If any term or provision of this Lease, the deletion of which would not adversely affect the receipt of any material benefit by either Party hereunder, shall be held to be invalid or unenforceable, the remainder of this Lease shall not be affected thereby and each other term and provision of this Lease shall be valid and enforceable to the fullest extent permitted by Law. The Parties intend and agree that in lieu of each clause or provision of this Lease that is illegal, invalid or unenforceable, the dispute resolution body shall supply as a part of this Lease an enforceable clause or provision as similar in terms to such illegal, invalid or unenforceable clause or provision as may be possible.

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Lease in two original counterparts on the date first written above.

Department

**CALIFORNIA DEPARTMENT OF
TRANSPORTATION**

By: _____
Name: _____
Title: _____

DEVELOPER

_____,
a _____

By: _____
Name: _____
Title _____

By: _____
Name: _____
Title: _____

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

Attn: _____

MEMORANDUM OF LEASE

THIS MEMORANDUM OF LEASE is made this ____ day of _____, 20__ by and between the CALIFORNIA DEPARTMENT OF TRANSPORTATION, a public agency of the State of California ("Department") and _____, a _____ ("Developer").

Witnesseth:

1. Department and Developer have this day entered into a Lease (the "Lease") and on _____, 20__ Department and Developer entered into a related Concession Agreement, Presidio Parkway Project (the "Agreement"). Under the Lease Developer has agreed to, and does hereby, lease from Department, and Department has agreed to, and does hereby, lease to Developer, on the terms and conditions set forth in the Lease, the premises in the City and County of San Francisco in the State of California legally described in Exhibit A attached hereto and made a part hereof, all for the purpose described in the Lease and Agreement of financing, developing, constructing, operating and maintaining the Project on the Project Right of Way as described and defined in the Lease and Agreement. All capitalized terms not otherwise defined herein shall have the same meaning as set forth in the Agreement.

2. The Lease sets forth the names and addresses of the parties thereto.

3. The term of the Lease for the property described in Exhibit A attached hereto commences upon the commencement of the Operating Period and shall continue until the earliest of (a) [33] years after the Effective Date; (b) [30] years after the latter of (i) the Substantial Completion Date (without regard to extension thereof due to Relief Events) or (ii) the Early Completion Date (without regard to extension thereof due to Relief Events; or (c) the termination of the Agreement as provided therein.

4. The term of the Lease is subject to earlier termination in accordance with the Agreement. Termination of the Agreement in accordance with its terms shall automatically result in termination of the Lease, as provided in Section 19.6 of the Agreement. The term of this Lease may be extended only as provided in the Agreement.

5. In the event of any conflict between the terms of this Memorandum and the terms of the Lease, the terms of the Lease shall control.

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have executed this Memorandum of Lease on the date first written above, for the purpose of providing an instrument for recording.

Department

**CALIFORNIA DEPARTMENT OF
TRANSPORTATION**

By: _____
Name: _____
Title: _____

DEVELOPER

_____,
a _____

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

State of California
County of _____

On _____ before me, _____
(Here insert name and title of the officer)

personally appeared _____
who proved to me on the basis of satisfactory evidence to be the person(s) whose
name(s) is/are subscribed to the within instrument and acknowledged to me that
he/she/they executed the same in his/her/their authorized capacity(ies), and that by
his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public

(Notary Seal)

State of California
County of _____

On _____ before me, _____
(Here insert name and title of the officer)

personally appeared _____
who proved to me on the basis of satisfactory evidence to be the person(s) whose
name(s) is/are subscribed to the within instrument and acknowledged to me that
he/she/they executed the same in his/her/their authorized capacity(ies), and that by
his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.

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the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public

(Notary Seal)

State of California
County of _____

On _____ before me, _____
(Here insert name and title of the officer)

personally appeared _____
who proved to me on the basis of satisfactory evidence to be the person(s) whose
name(s) is/are subscribed to the within instrument and acknowledged to me that
he/she/they executed the same in his/her/their authorized capacity(ies), and that by
his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of
which the person(s) acted, executed the instrument.

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the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary Public

(Notary Seal)

Appendix

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4 Milestone Dates, Milestone Payments and Milestone Payment Adjustments

4-A Milestone Dates and Milestone Amounts

4-B Milestone Payment Adjustments

APPENDIX 4 A
MILESTONE DATE AND MILESTONE AMOUNT

Milestone Date	Milestone Payment Amount
Substantial Completion	[\$150,000,000]

APPENDIX 4 B
MILESTONE PAYMENT ADJUSTMENTS

UNDER DEVELOPMENT

Appendix

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5 Right of Way Plans

5-A Permanent Right of Way Plans

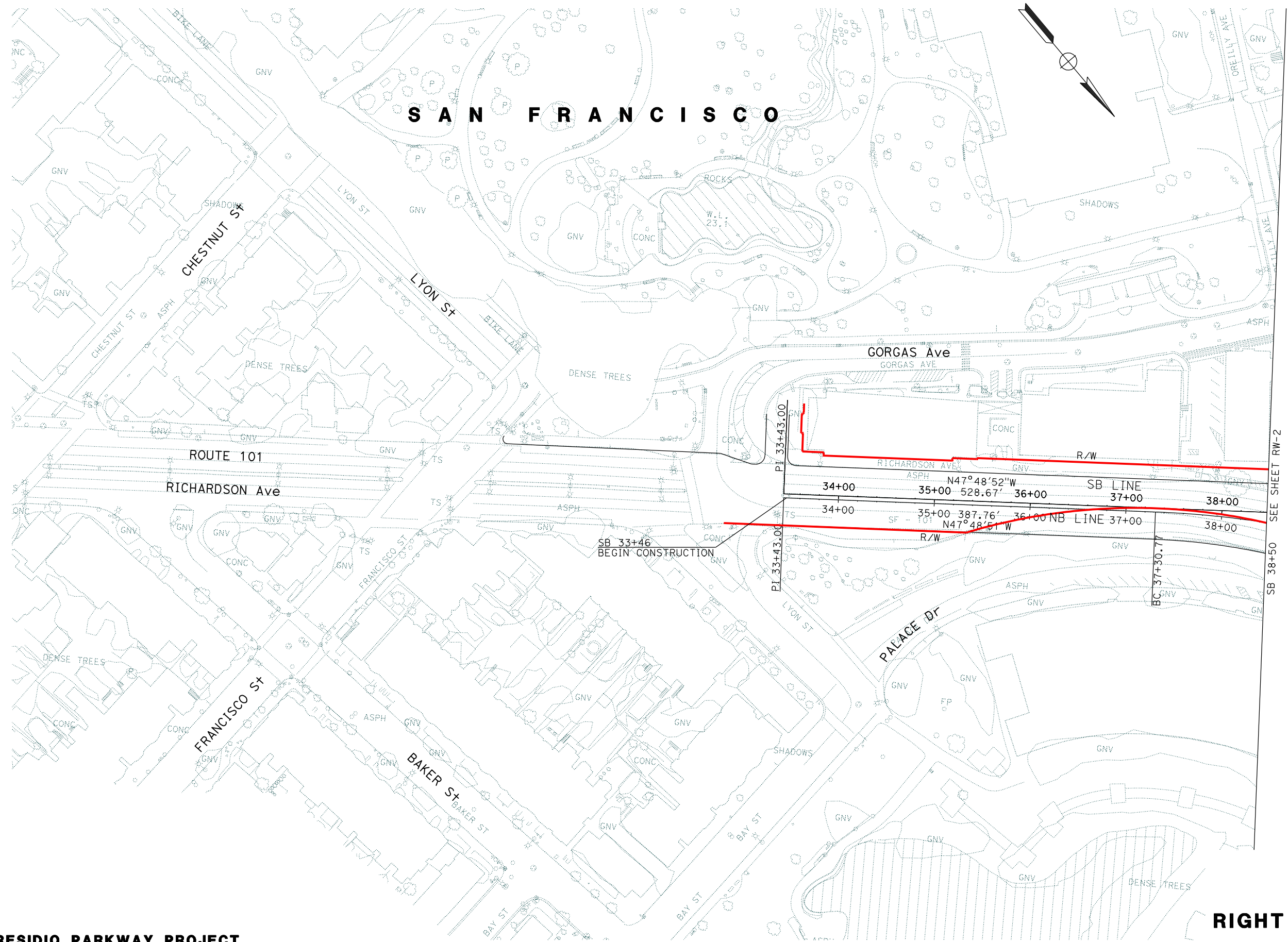
5-B Map of Temporary Easements, Haul Routes, Staging Areas

5-C O&M Limits

APPENDIX 5
RIGHT OF WAY PLANS

See Right of Way plans attached.

SHEET No	TOTAL SHEETS



PRESIDIO PARKWAY PROJECT
- PRELIMINARY -

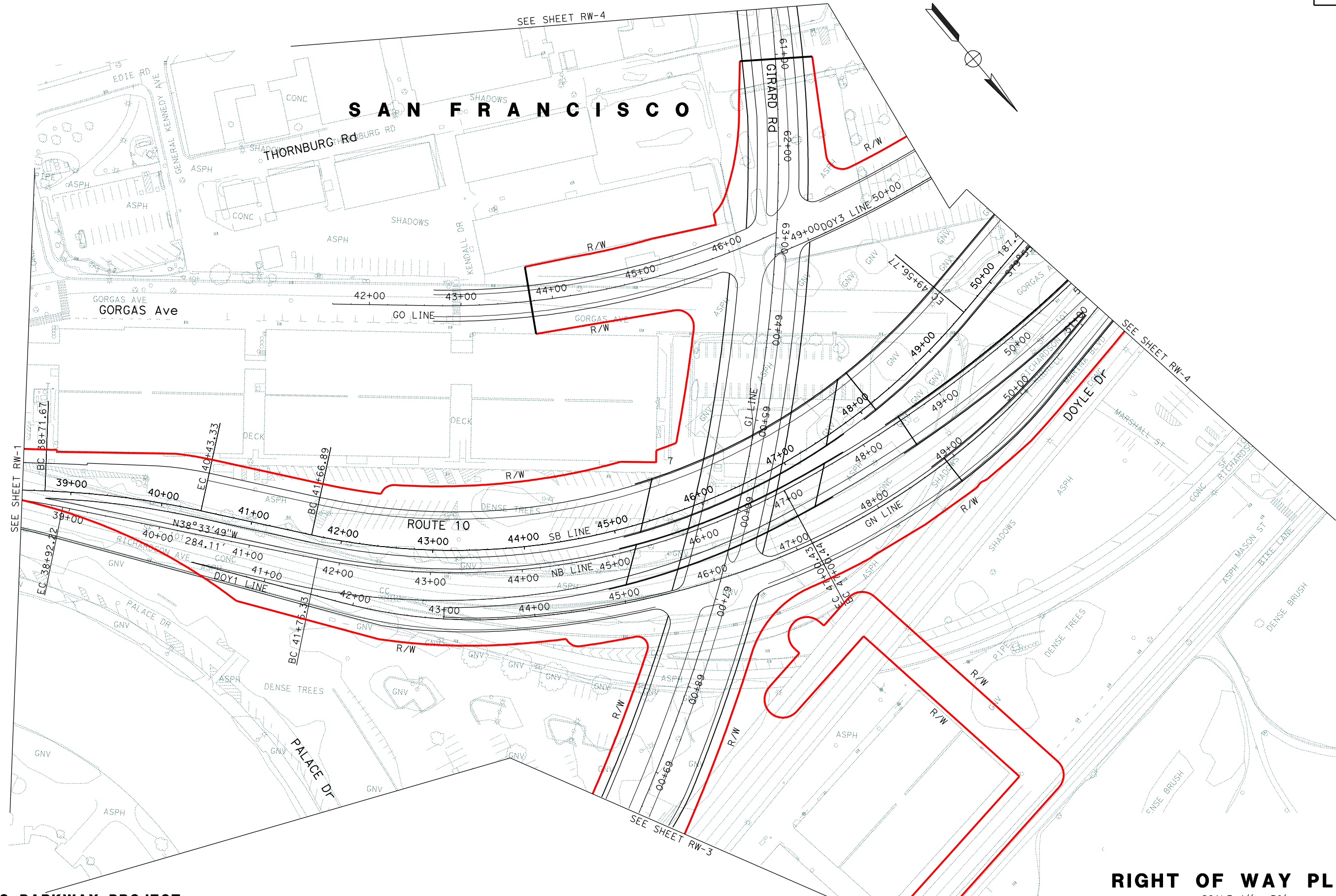
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PRESIDIO PARKWAY PROJECT
- PRELIMINARY -

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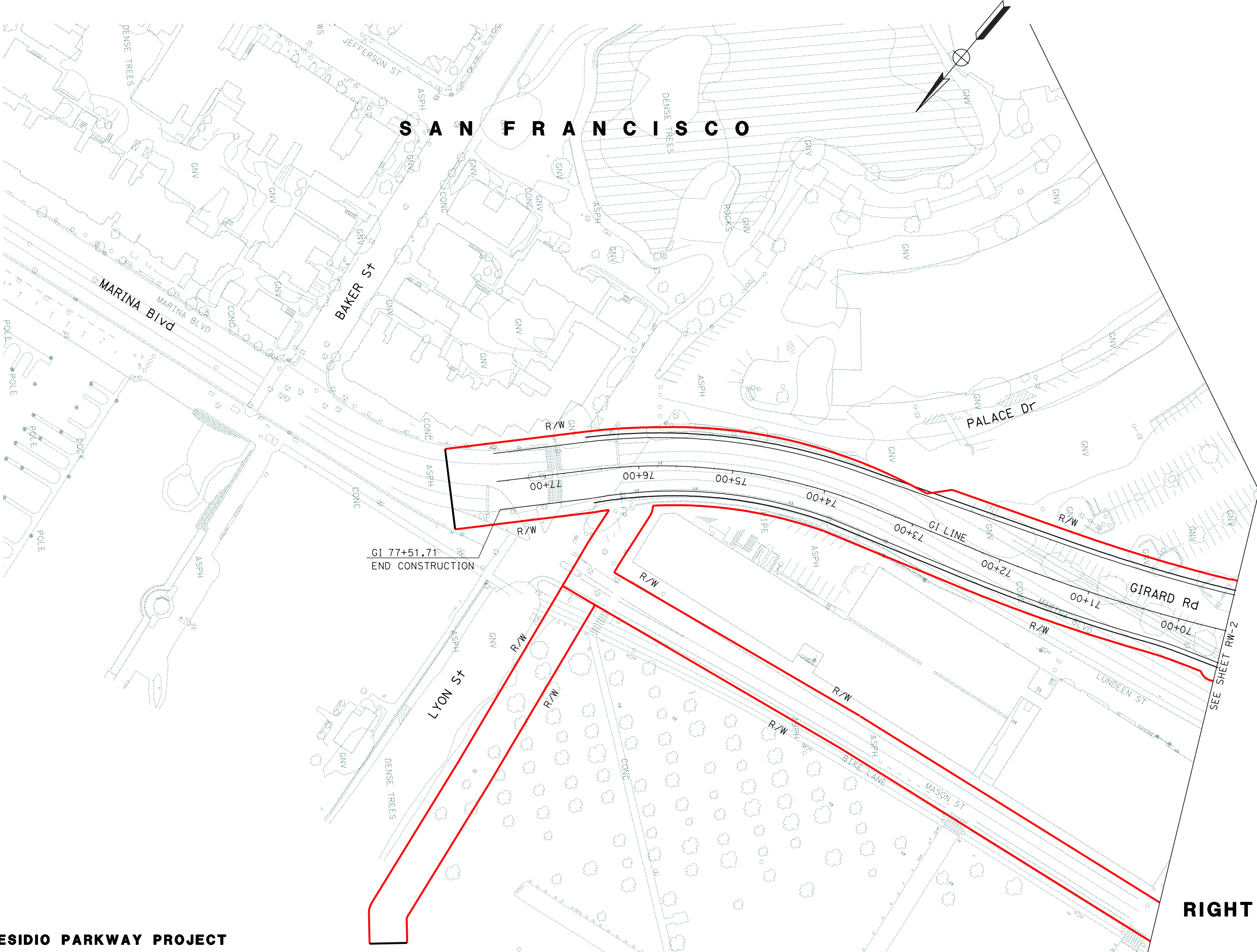
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PRESIDIO PARKWAY PROJECT
- PRELIMINARY -

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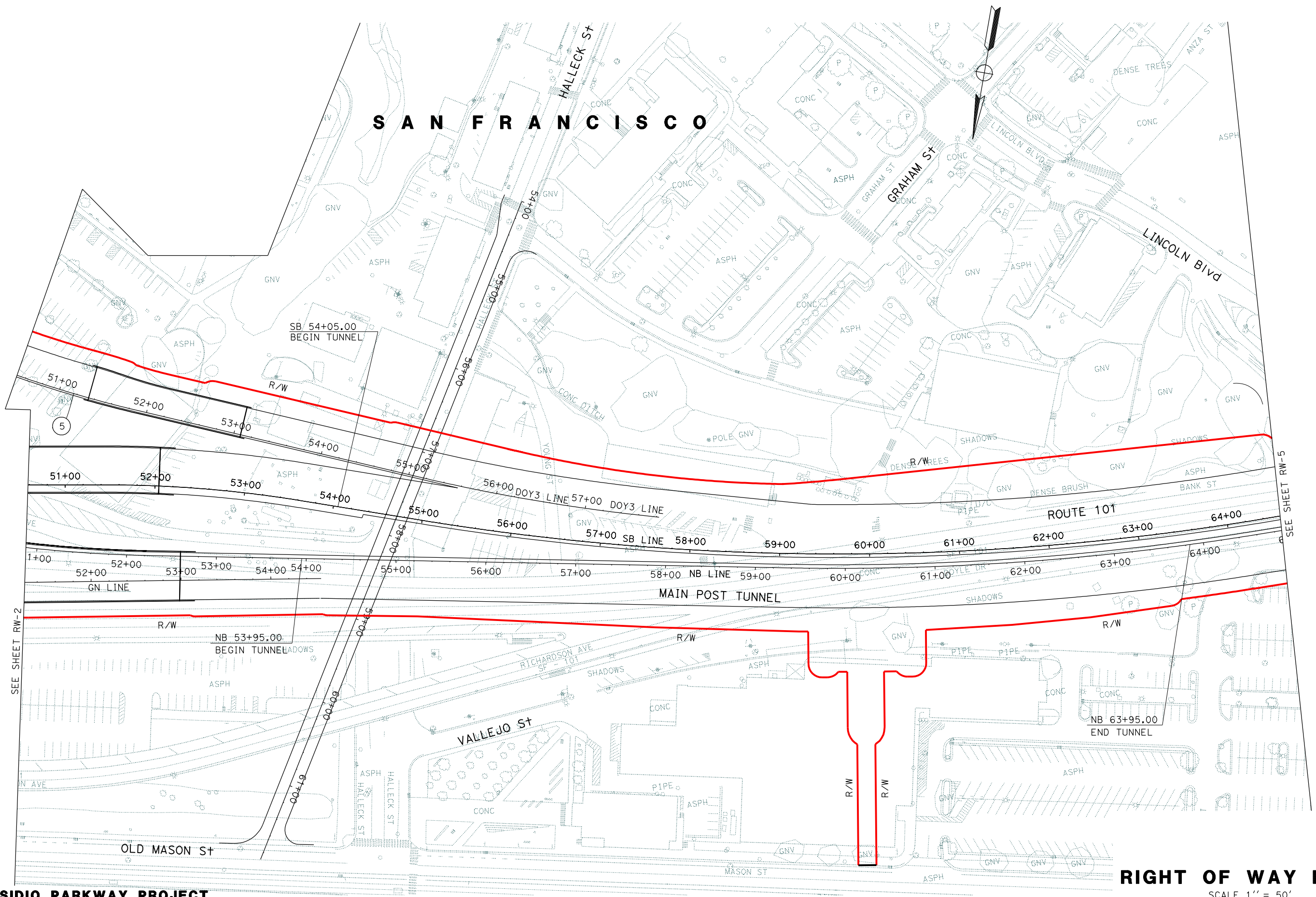
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- PRELIMINARY -

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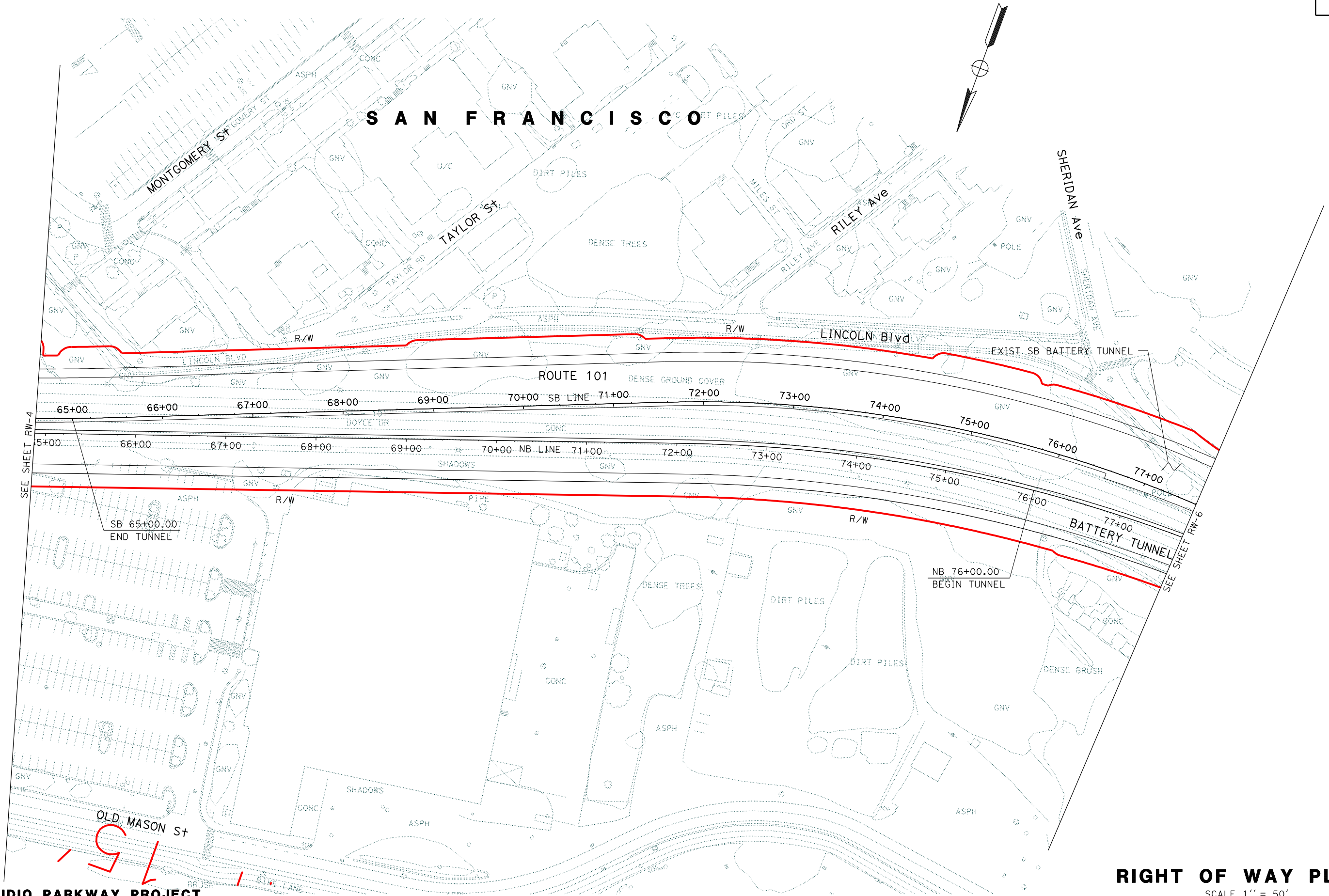
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PRESIDIO PARKWAY PROJECT
- PRELIMINARY -

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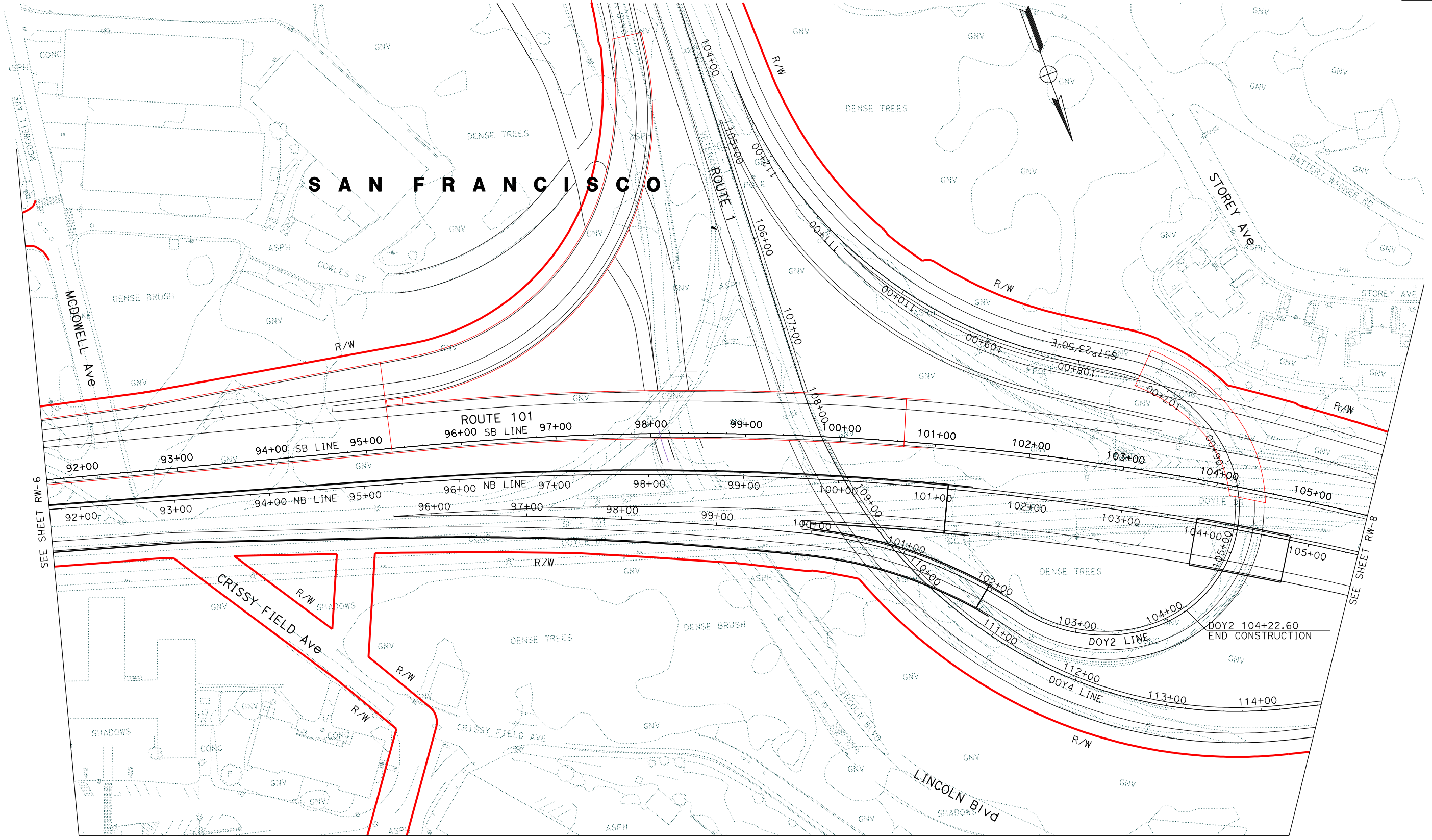
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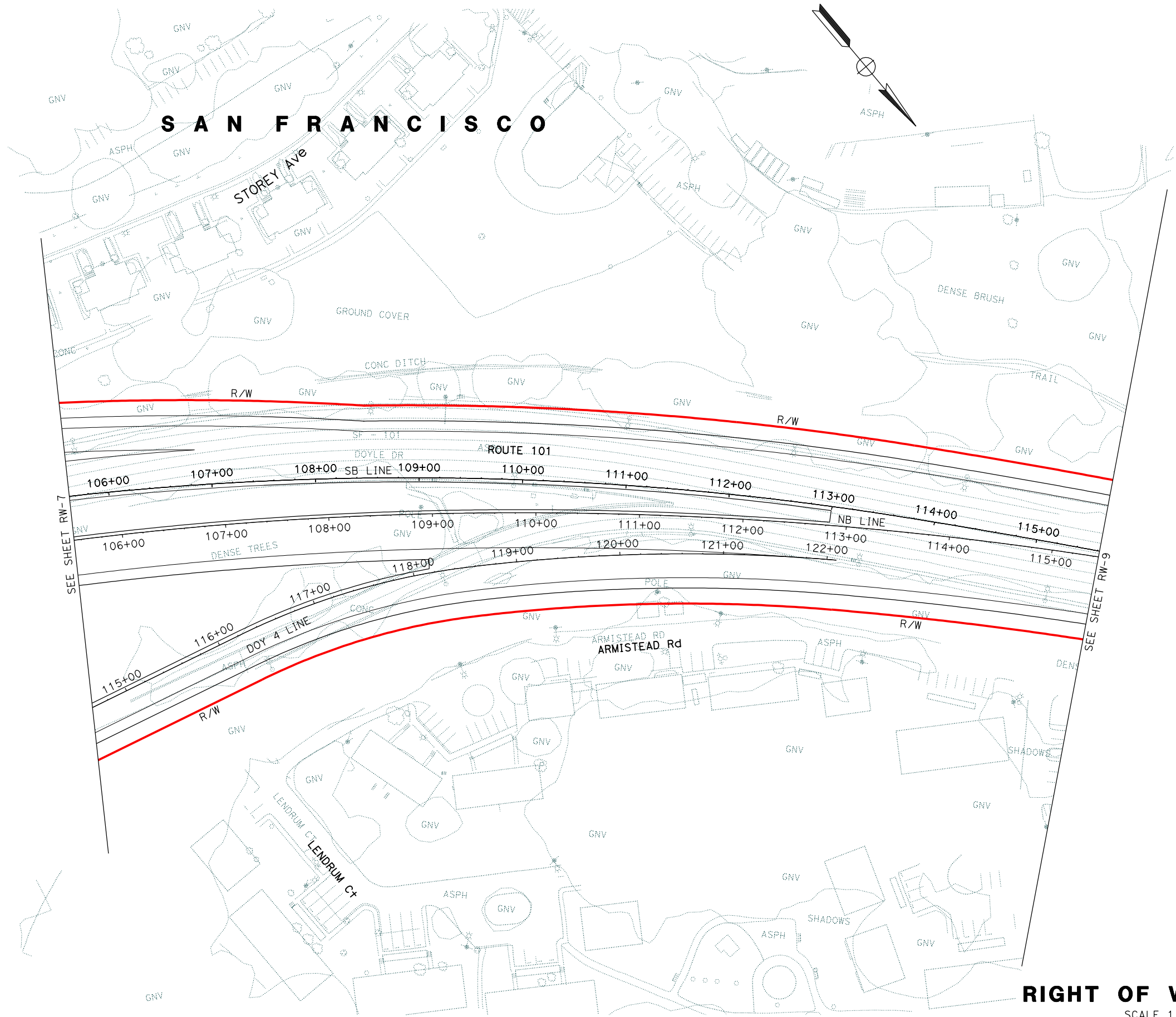
PRESIDIO PARKWAY PROJECT
- PRELIMINARY -

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RW-7

SHEET No	TOTAL SHEETS



PRESIDIO PARKWAY PROJECT
- PRELIMINARY -

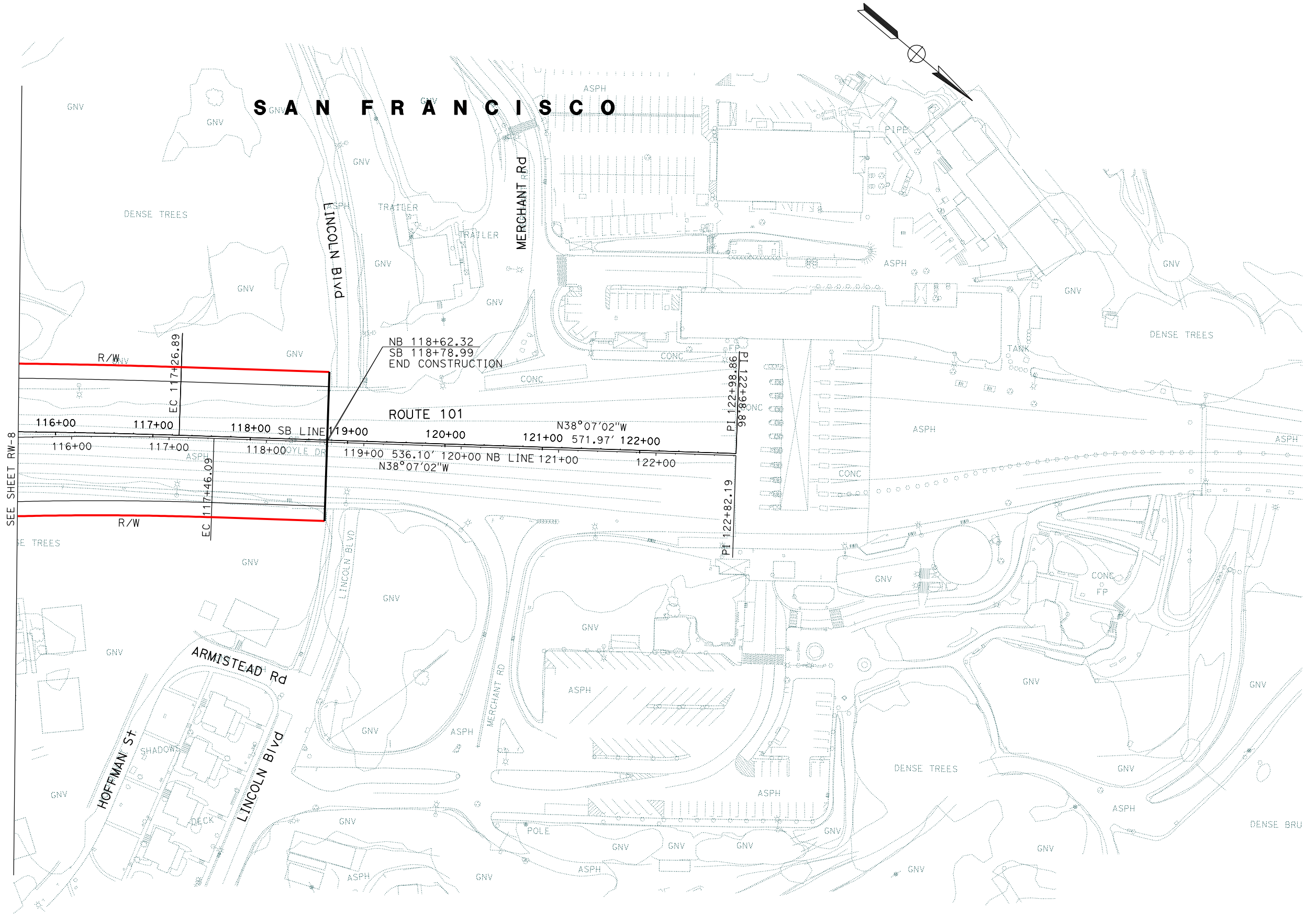
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RW-8

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SHEET No	TOTAL SHEETS



PRESIDIO PARKWAY PROJECT
- PRELIMINARY - DESIGN -

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RW-9

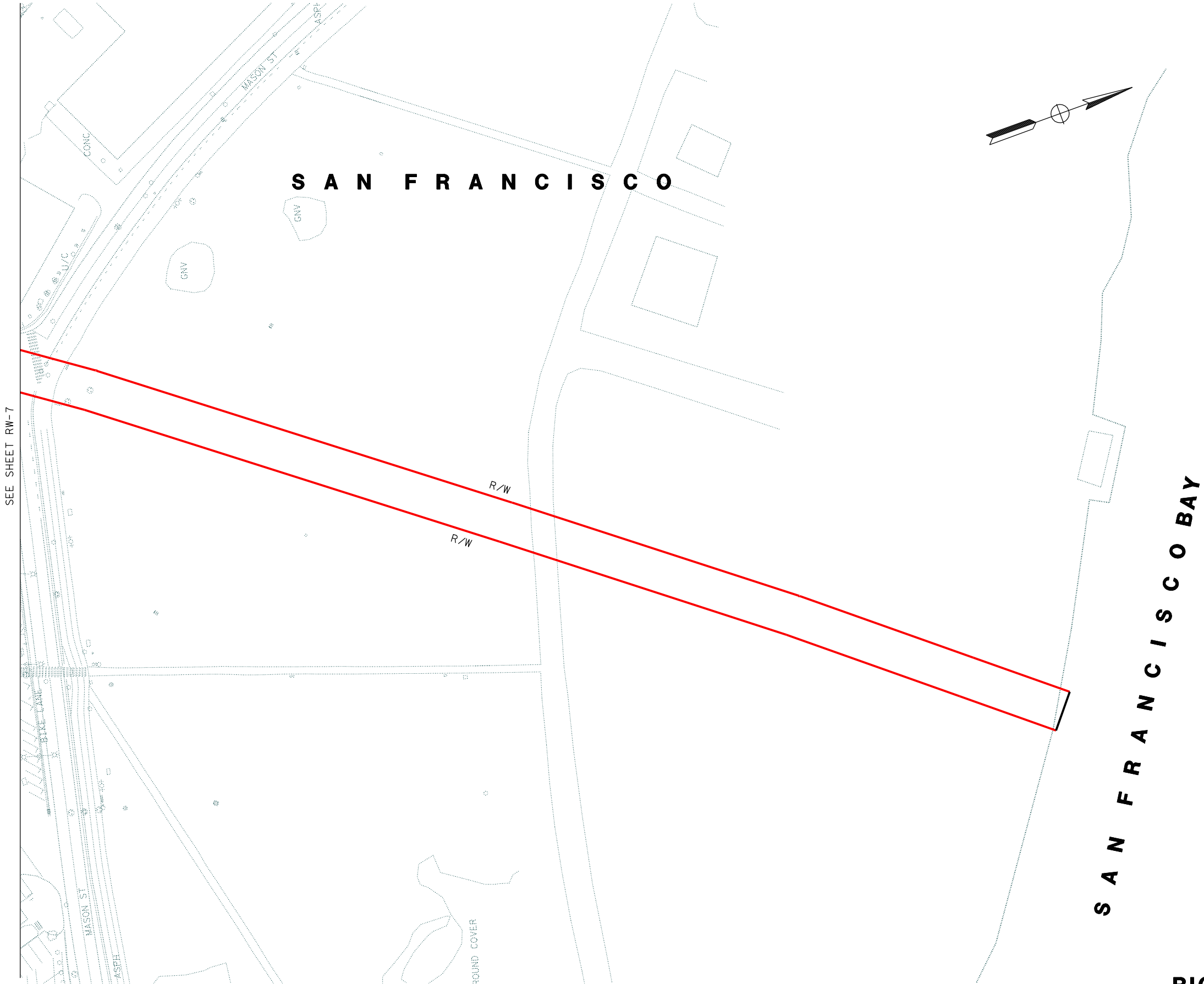
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SHEET No	TOTAL SHEETS



PRESIDIO PARKWAY PROJECT
- PRELIMINARY -

RIGHT OF WAY PLAN
SCALE 1" = 50'
RW-10

Appendix

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6 Noncompliance Points System

UNDER DEVELOPMENT

Appendix

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7 Payment Mechanism

APPENDIX 7

PAYMENT MECHANISM

[All wording s subject to legal drafting at later stage.]

SECTION 1 – DEFINITIONS

- (a) Capitalized terms used in this Appendix 6 shall have the meanings given to them in Appendix 1 of this Agreement.

SECTION 2 - AVAILABILITY PAYMENT

2.1 Annual Maximum Availability Payment

- (a) MAP_y is the Maximum Availability Payment for Contract Year y indexed for inflation according to the following formula:

$$MAP_y = MAP_{Base} \times Escalation_y$$

Where:

- MAP_{Base} , the Maximum Availability Payment, will be based on the bids, subject to adjustment
- Base = [December 31, 2010]
- Escalation = escalation factor for Contract Year y
The contract year is the 12-month period commencing the year in which the contract is signed.

2.2 Escalation Factor

- (a) The inflation index for any Contract Year y will be calculated using the following formula:

$$Escalation_y = m_{cap} + \left((1 - m_{cap}) \times \frac{CPI_y}{CPI_{Base}} \right)$$

Where m_{cap} = the proportion of the availability payment that is associated with the bidder's asset construction cost, a bid variable

2.3 Quarterly Availability Payment

- (a) The Quarterly Availability Payment with respect to any Quarter q for the period after the Substantial Completion Date shall be calculated using the following formula:

$$QAP_{q,y} = \frac{MAP_y}{4} - QPA_{q,y}$$

Where:

- $QAP_{q,y}$ = the Quarterly Availability Payment for Quarter q in Contract Year y
- $QPA_{q,y}$ = the Quarterly Payment Adjustment for Quarter q in Contract Year y

SECTION 3 – CALCULATION OF PAYMENT ADJUSTMENTS

3.1 Quarterly Payment Adjustment

- (a) The Quarterly Payment Adjustment (QPA) for any Quarter q for the period after the Substantial Completion Date shall be calculated as follows:

$$QPA_{q,y} = QUA_{q,y} + QNA_{q,y}$$

Where:

- $QPA_{q,y}$ = Quarterly Payment Adjustment for Quarter q in Contract Year y
- $QUA_{q,y}$ = Quarterly Unavailability Adjustment for Quarter q in Contract Year y
- $QNA_{q,y}$ = Quarterly Noncompliance Adjustment for Quarter q in Contract Year y

3.2 Quarterly Unavailability Adjustment

- (a) The Quarterly Unavailability Adjustments (QUA) for each Unavailability Event in Quarter q for the period after the Substantial Completion Date shall be calculated as follows:

$$QUA_{q,y} = \sum_{e=1}^q UA_e$$

Where $QUA_{q,y}$ = Quarterly Unavailability Adjustment for the Quarter q in Contract Year y with respect to each Unavailability Event e that occurs during the Quarter

$$UA_e = \sum_{h=1}^h \left(UF_{h,td} \times \frac{MAP_y}{(365 \times 24)} \right)$$

Where:

- UA_e = Unavailability Adjustment with respect to each Unavailability Event e that occurs during the Quarter
- $UF_{h,td}$ = Unavailability Factor for each hour h and Travel Direction td in which each Unavailability Event e occurs

3.3 Unavailability Factors

- (a) Each Unavailability Event will be deemed to have commenced from the moment such Unavailability Event actually begins. If the starting time of such Unavailability Event is unknown, such Unavailability Event will be deemed to have started the earlier of the moment it was (a) discovered by the Developer or (b) reported to the Developer by the Department or by a third party. Each Unavailability Event will be deemed to persist during each hour thereafter until such Unavailability Event is resolved. An Unavailability Event occurring at anytime during an hour shall be deemed to have started at the beginning of the hour, and an Unavailability Event that ends at anytime during an hour shall be deemed to have ended at the end of that hour.
- (b) Each Unavailability Event is described by an Unavailability Factor for the given hour with respect to the Travel Direction in which the Unavailability Event occurs, in accordance with Table 1, below.

Table 1: Unavailability Factors

Segment	Lanes Closed	North- or Southbound (Weekdays)			North- or Southbound (Weekends)		
		High Priority Hours (07.00-11.00 (SB), 16.00-19.00(NB))	Mid Priority Hours (11.00-16.00, 19.00-21.00, 06.00-07.00, 07.00-11.00(NB), 16.00-19.00(SB))	Low Priority Hours (21.00-06.00)	High Priority Hours (12.00-19.00)	Mid Priority Hours (09.00-12.00, 19.00-21.00)	Low Priority Hours (21.00-09.00)
Segments 5 lanes in each direction	1	[0.35]	[0.23]	[0.01]	[0.32]	[0.24]	[0.02]
	2	[0.52]	[0.35]	[0.01]	[0.48]	[0.36]	[0.02]
	3	[0.61]	[0.41]	[0.08]	[0.56]	[0.42]	[0.10]
	4	[0.87]	[0.58]	[0.09]	[0.81]	[0.61]	[0.12]
	5	[1.00]	[0.67]	[0.15]	[0.93]	[0.70]	[0.20]
Segments 4 lanes in each direction	1	[0.52]	[0.35]	[0.01]	[0.48]	[0.36]	[0.02]
	2	[0.61]	[0.41]	[0.03]	[0.56]	[0.42]	[0.03]
	3	[0.87]	[0.58]	[0.08]	[0.81]	[0.61]	[0.10]
	4	[1.00]	[0.67]	[0.15]	[0.93]	[0.70]	[0.20]
Segments with up to 3 lanes in each direction	1	[0.52]	[0.35]	[0.01]	[0.48]	[0.36]	[0.02]
	2	[0.87]	[0.58]	[0.08]	[0.81]	[0.61]	[0.10]
	3	[1.00]	[0.67]	[0.15]	[0.93]	[0.70]	[0.20]
1-Lane Ramps	1	[0.87]	[0.58]	[0.09]	[0.81]	[0.61]	[0.12]
2-Lane Ramps	1	[0.52]	[0.35]	[0.05]	[0.48]	[0.36]	[0.07]
	2	[0.87]	[0.58]	[0.09]	[0.81]	[0.61]	[0.12]
All crossroads, either direction	1	[0.52]	[0.35]	[0.03]	[0.48]	[0.36]	[0.03]
	2	[0.87]	[0.58]	[0.08]	[0.81]	[0.61]	[0.10]

(c) When no Unavailability Event occurs, the hourly Unavailability Factor is 0.00.

(d) An Unavailability Event, the duration of which spans portions of two or more hours, will be treated as multiple, separate Unavailability Events, one within each hour or portion thereof.

(e) If two or more Unavailability Events occur concurrently in the same Travel Direction and within half a mile of each other in the same hour, only the greater of the relevant Unavailability Adjustments relating to the respective Unavailability Events, and resulting

from the application of the formula set out in Section 3.2 of this Appendix, shall be included in the calculation of the Quarterly Unavailability Adjustment.

- (f) The Developer will not permit the occurrence of an Unavailability Event in any Travel Direction that involves the closure of all lanes on any part of the road at any time for more than 30 minutes. If an Unavailability Event occurs on any part of the road in any Travel Direction that involves the closure of all lanes for more than 30 minutes or if multiple Unavailability Events result in the closure of all lanes for more than 30 cumulative minutes in one day, the adjustment to the daily availability payment will be equal to:

$$50\% \times \frac{MAP_y}{365}$$

for each travel direction that is unavailable.

- (g) Notwithstanding 3.2(j), the total Unavailability Adjustment with respect to any day d in the relevant Quarter q shall be the lesser of:

$$UA_{d,q} = \sum_{e=1}^{e,d} UA_e \quad \text{or} \quad 100\% \times \frac{MAP_y}{365}$$

- (h) For clarity, no Unavailability Adjustment shall be calculated with respect to any Excluded Event.
- (i) The Unavailability Adjustment with respect to an Unavailability Event that is the direct result of a Force Majeure Event shall be 0.00, except as provided in section 9.2.2 of this Agreement.

3.3 Quarterly Noncompliance Adjustment

- (a) The Quarterly Noncompliance Adjustment, $QNA_{q,y}$, with respect to each Noncompliance in Quarter q and Contract Year y after the Substantial Completion Date, shall be determined in accordance with the following formula:

$$QNA_{q,y} = \frac{CPI_y}{CPI_{Base}} \times \sum_{d=1}^n NCA_{adjustment_d}$$

Where:

- $NCA_{adjustment_d}$ is the adjustment related to the Noncompliance Adjustment Points Balance on each day, up to “n” total days in Quarter q . It is equal to \$750 $\times NCA_{adjustmentPoints_d}$ with respect to each day after the Substantial Completion Date.

$$NCA_{adjustment_d} = S[] \times NCA_{adjustmentPoints_d}$$

Where:

- $NCA_{adjustmentPoints_d}$ is the Noncompliance Adjustments Points Balance at the end of each day during the Concession Period.
 - CPI_y is the CPI index applied to Contract Year y , and CPI_{Base} = CPI index for the base year 2010, both as defined in Appendix 1 of this Agreement.
- (b) The assignment of Noncompliance Points with respect of each Noncompliance shall be undertaken in accordance with Article 6 and Appendix 5 of this Agreement.
- (c) The Noncompliance Adjustment Points Balance with respect to any day during the Concession Period is the aggregate number of Noncompliance Points in respect of each Noncompliance that is remains unresolved on that day.

Appendix

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8 List of Initial Funding Agreements and Initial Security Documents

UNDER DEVELOPMENT

Appendix

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9 Insurance Coverage Requirements

APPENDIX 9

INSURANCE COVERAGE REQUIREMENTS AND INSURANCE BENCHMARKING

Section 1. Insurance Coverage Requirements

COVERAGE	BUILDERS RISK Required when performing Construction Work
Form:	Builders All Risk (BAR) Completed Value Form
Named Insured:	<ul style="list-style-type: none"> ▪ Developer and/or its Contractors of every tier as their interest may appear ▪ Department
Policy Term:	48 months with 12 month annual extensions to 60 months or until Final Acceptance
Policy Limit:	Per occurrence up to the full replacement cost of the covered property loss, plus an allowance for expediting expenses/extra expense, professional fees, demolition and debris removal, without risk of co-insurance.
Sub Limits:	<ul style="list-style-type: none"> ▪ Inland transit/ocean cargo US\$10 million (separate policy acceptable) ▪ Offsite storage US\$10 million ▪ Expediting expenses/extra expense US\$25 million ▪ Demolition, increased cost of construction including undamaged property US\$25 million ▪ Debris Removal US\$25 million ▪ Professional fees US\$5 million
Coverage Extensions / Conditions:	<ul style="list-style-type: none"> ▪ 72-hour occurrence period ▪ Civil authority or ingress/egress clauses ▪ Design error/faulty workmanship exclusion, except ensuing loss not otherwise excluded is covered (LEG 2/96) ▪ Testing included ▪ Others as specified in <u>Section 16.1.2</u> of Agreement
Insured Perils:	All risk of direct physical loss or damage including fire, lightning, explosion, collapse, flood, sinkhole, boiler & machinery, etc., provided that perils of Seismic Event and

	Terrorism need not be insured
Insured Property:	All real and personal property in the course of construction (including materials to be incorporated therein) including footings, foundations, and excavations costs, installation, testing and/or commissioning related to the Project.
Deductibles:	Physical damage: Not more than US\$1,000,000 per occurrence
Coinsurance:	Waived
Valuation:	Replacement cost for property damage
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement. Surplus lines insurers are acceptable, provided that they meet the requirements of <u>Section 16.1.2.1</u> .

COVERAGE	PROPERTY INSURANCE FOR O&M Required from NTP2 until end of Term, for all property, except real and personal property in the course of construction
Form:	All Risk
Named Insured:	Developer
Additional Insured:	Department and Lead Operations and Maintenance Firm as their interests may appear
Policy Term:	Annual/Renewable
Policy Limit:	Per occurrence sufficient to reinstate the insured property and for a sum not less than the probable maximum loss, plus an allowance for expediting expense/extra expense, professional fees, demolition and debris removal, without risk of co-insurance
Sub Limits:	<ul style="list-style-type: none"> ▪ Offsite storage US\$10 million ▪ Expediting expenses/extra expense US\$25 million ▪ Demolition, increased cost of construction including undamaged property US\$25 million ▪ Debris removal US\$25 million ▪ Professional fees US\$5 million

Coverage Extensions / Conditions:	<ul style="list-style-type: none"> ▪ 72-hour occurrence period ▪ Civil authority or ingress/egress clauses ▪ Design error/faulty workmanship exclusion, except ensuing loss not otherwise excluded is covered (LEG 2/96) ▪ Others as specified in <u>Section 16.1.2</u> of Agreement
Insured Perils:	All risk of direct physical loss or damage including fire, lightning, explosion, collapse, flood, sinkhole, boiler & machinery, etc., provided that perils of Seismic Event and Terrorism need not be insured.
Insured Property:	All real and personal property of every description except that in the course of construction
Deductibles:	Physical damage: Not more than US\$1,000,000 per occurrence
Coinsurance:	Waived
Valuation:	Replacement cost for property damage
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement. Surplus lines insurers are acceptable, provided that they meet the requirements of <u>Section 16.1.2.1</u> .

COVERAGE	WORKERS' COMPENSATION / EMPLOYERS' LIABILITY COMPLIANT WITH CALIFORNIA STATUTE Required during the Term of the Agreement
Named Insured:	Policies required of Developer and Contractors of every tier wherever and whenever OCIP policy does not apply
Limits:	Workers' Compensation: Statutory Employers' Liability: US\$1 million per occurrence US\$1 million disease per employee US\$1 million disease policy limit
Policy Deductible:	Developer/Lead Contractor/Lead Operations and Maintenance Firm: Not to exceed US\$1 million per occurrence Other Contractors: Not to exceed US\$250,000 per occurrence

Additional Terms:	<p>Voluntary compensation endorsement</p> <p>Where applicable, endorsed to cover US Longshore and Harbor Workers Act, and Jones Act</p> <p>Others as specified in <u>Section 16.1.2</u> of Agreement</p>
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement

COVERAGE	<p>COMMERCIAL GENERAL LIABILITY, ISO FORM CG 00 01 04 OR EQUIVALENT</p> <p>Required during the Term of the Agreement</p>
Named Insured:	<p>Until Final Acceptance or any earlier termination of OCIP coverage:</p> <ul style="list-style-type: none"> Developer and OCIP-enrolled Contractors for Work performed away from OCIP Site or otherwise not covered by OCIP (including O&M Work) OCIP-excluded Contractors <p>After Final Acceptance or any earlier termination of OCIP coverage:</p> <ul style="list-style-type: none"> Developer Lead Operations and Maintenance Firm Other Contractors
Additional Named Insured:	Department, but only with respect to liability arising out of the Project
Additional Insured	Department and other Indemnified Parties
Policy Limits:	<p>Until Final Acceptance or any earlier termination of OCIP coverage:</p> <p>US\$1 million per occurrence US\$5 million general aggregate per policy period US\$5 million completed operations aggregate</p> <p>After Final Acceptance or any earlier termination of OCIP coverage:</p> <p>US\$25 million per occurrence US\$25 million in the aggregate per policy period</p>

	Policy limits shall be shared by all insured and additional insured parties and shall reinstate annually. Policy limits may be met through a combination of primary and excess liability coverage, provided that no gap in coverage exists.
Policy Deductible	Not to exceed US\$500,000 per occurrence
Additional Terms:	<ul style="list-style-type: none"> • Primary to any insurance or self-insurance otherwise available to insured parties • All limits dedicated to the Project • No exclusions for explosion, collapse, or underground (XCU) • Removal of exclusion for work within 50 feet of a railroad • Additional insureds covered for completed operations • Liability covers acts or omissions of named insured's employees engaged in the work • Developer's policy to include non-owned automobile liability, unless covered by Developer's automobile liability policy • No exclusion for pollution liability • No other restrictive exclusions without prior Department approval • Others as specified in <u>Section 16.1.2</u> of Agreement
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement.

COVERAGE	MARINE LIABILITY INSURANCE Required if any activity creates exposure under USL&H or Jones Act or creates other maritime exposure, such as when vessels are used in connection with the Work
Named Insured:	Operators of barges and other vessels
Policy Limits:	Limits as reasonably approved by the Department, to include: Broad form protection & indemnity Jones Act coverage Marine Bumbershoot Policy limits may be met through a combination of primary and excess liability coverage, provided that no gap in

	coverage exists and Excess Liability coverage applies to non-owned watercraft so that no operated vessel has less than the approved limits for P&I and Jones Act coverage.
Policy Deductible:	Not to exceed US\$500,000 per occurrence
Additional Insured	Department and other Indemnified Parties
Additional Terms	As specified in <u>Section 16.1.2</u> of Agreement
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement.

COVERAGE	AIRCRAFT LIABILITY Required when aircraft are used in connection with the Work
Named Insured:	Operators of aircraft
Policy Limits:	Limits as reasonably approved by the Department
Policy Deductible:	Not to exceed US\$250,000 per occurrence
Additional Insured	Department and other Indemnified Parties
Additional Terms:	<ul style="list-style-type: none"> • Applies to owned, non-owned, and hired aircraft • Others as specified in <u>Section 16.1.2</u> of Agreement
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement.

COVERAGE	COMMERCIAL AUTOMOBILE LIABILITY Required during the Term of the Agreement
Form:	ISO Business Automobile Policy or equivalent
Named Insured:	Individual policies provided by Developer and/or Contractors of every tier
Additional Insureds	Department and other Indemnified Parties
Policy Limits:	US\$25 million combined single limit Policy limits may be met through a combination of primary

	and excess liability coverage, provided that no gap in coverage exists and excess liability coverage applies to non-owned auto so that no operated auto has less than US\$25 million
Policy Deductible:	Developer/Lead Contractor/Lead Operations and Maintenance Firm: Not to exceed US\$1 million per occurrence Other Contractors: Not to exceed US\$250,000 per occurrence
Additional Terms:	<ul style="list-style-type: none"> • Developer's, Lead Contractor's or Lead Operations and Maintenance Firm's policy to provide "any auto" coverage or coverage for owned, non-owned and hired vehicles • Endorsement – Motor Carrier Act Endorsement-Hazardous materials clean up (MCS-90) for any Contractor who will at any time transport Contaminated Materials • Others as specified in <u>Section 16.1.2</u> of Agreement
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement

COVERAGE	PROFESSIONAL LIABILITY COVERAGE Required when performing Design Work
Form	Claims-made
Named Insured:	The Lead Engineering Firm, the geotechnical consultant and any Contractor performing Design Work
Retroactive Date:	Date of the first Contract for Design Work
Policy Term:	Construction Period For Design Work in connection with Renewal Work or Upgrades, policy shall reinstate annually
Extended Reported Period:	Five years
Policy Limits:	US\$10 million each claim/policy aggregate for the Lead Engineering Firm and any Contractor performing Design Work that is not a subcontractor to the Lead Engineering Firm

	US\$3 million each claim/policy aggregate for other Contractors performing Design Work
Key Coverages:	<ul style="list-style-type: none"> Includes the Owner's Indemnification Endorsement No exclusions or limitations for consequential or delay damages or exceeded cost estimate
Policy Deductible:	Not to exceed US\$1 million per occurrence
Additional Terms:	<ul style="list-style-type: none"> Policy need not be Project-specific Others as specified in <u>Section 16.1.2</u> of Agreement
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement

COVERAGE	CONTRACTORS POLLUTION LIABILITY Required when performing Construction Work except that performed during period OCIP is in effect
Form:	Occurrence form preferred / claims-made acceptable
Named Insured:	Developer and Contractors of every tier
Policy Term:	6 years with 4 year extended reporting period (ERP) or term of construction plus ERP to equal a total of 10 years
Project Policy Limits:	US\$20,000,000 minimum specific to the Project only
Policy Deductible:	Not to exceed US\$1 million per occurrence
Specific Terms and Conditions:	<ul style="list-style-type: none"> Coverage must be primary Natural resource damages must be covered No exclusion for work in or adjacent to State or Federal Superfund Sites Covered Operations – all those performed by or on behalf of the Named Insured Bodily Injury definition – deemed to include mental anguish, shock, mental injury or illness whether or not accompanied by physical injury or illness by any person or persons Property Damage definition – deemed to include diminution in value of third party property whether or not accompanied by physical damage Blanket Contractual – for all written contracts (including third party action over claims)

	<ul style="list-style-type: none"> ▪ Named Insured interest in joint ventures to be included/delete joint venture exclusion ▪ Coverage for transportation (in transit, loading and unloading exposure) to or from a jobsite ▪ Non-owned disposal site coverage – for treatment, storage or disposal facilities which receive hazardous materials from the insured project ▪ No exclusions for radioactive matter/naturally occurring radioactive materials ▪ No exclusions for asbestos and lead/lead paint ▪ Coverage for punitive/exemplary damages, civil fines and penalties, where insurable by law ▪ Others as specified in <u>Section 16.1.2</u> of Agreement
Insurer:	Per <u>Section 16.1.2.1</u> of the Agreement

Section 2. Insurance Premium Benchmarking

Subject to Section 16.1.2.13 of the Agreement, this Section allocates the risk between the Department and Developer of significant increases in insurance premiums for Insurance Policies required during the Operating Period through an insurance benchmarking process. The benchmarking process will occur at each insurance renewal period, but no less than triennially (unless the Parties mutually agree to a longer term), through the following:

- 2.1 The only increases in premiums that may be considered in the benchmarking process are those caused by changes in general market conditions in the insurance industry affecting insurance for highway facilities, and Developer shall bear the burden of proving that premium increases are the result of such changes in general market conditions. For the avoidance of doubt, no increase in insurance premiums attributable to any of the following factors (“**Excluded Premium Increases**”) shall be considered in determining increases in insurance premiums under benchmarking process described in this Section 2.1:
- (a) Particular conditions of the Project or Project Right of Way;
 - (b) Project-specific losses;
 - (c) Additional or extended coverages beyond those required under this Appendix 9;
 - (d) Deductibles less than the maximum deductibles set forth in this Appendix 9;
 - (e) Matters within the control of any Developer-Related Entity; or
 - (f) Claims or loss experience of any Developer-Related Entity or Affiliate, whether under an Insurance Policy required by Section 16.1 of the Agreement or in connection with any unrelated work or activity of Developer-Related Entities or Affiliates.
- 2.2 At 45 days prior to the estimated Final Acceptance Date and 45 days prior to each insurance renewal period (but no less than triennially, unless the Parties mutually agree to a longer term), Developer shall submit a report (“**Insurance Review Report**”) to the Department that includes the following elements:

- (a) Firm quotes from three established and recognized insurance providers for the Insurance Policies required during the Operating Period under this Appendix 9, without any variation from such requirements (“**Required Minimum Insurance Policies**”). The quotes shall represent the current and fair market cost of providing the Required Minimum Insurance Policies.
 - (b) The written binders of insurance in the form and content required under clause 1 of Section 16.1.2.4.1 of the Agreement with the premium invoices for the actual Insurance Policies obtained by Developer for the insurance renewal period during the Operating Period (“**Actual Insurance Policies**”).
 - (c) Except with respect to the initial Insurance Review Report, a comprehensive written analysis and explanation by Developer’s independent insurance broker setting forth (i) industry trends in premiums for the Required Minimum Insurance Policies, (ii) any claims (paid or reserved) since the last review period, with claim date(s), description of incident(s), claims amount(s), and the level of deductibles provided, (iii) the effect (if any) that factors described in Sections 1(a) through (f) above have had on the premiums for the Required Minimum Insurance Policies and the Actual Insurance Policies, and (iv) the Excluded Premium Increases (if any).
- 2.3 The Department, at its sole discretion, may independently assess the accuracy of the information in any Insurance Review Report and retains the right to perform its own independent insurance review, which may include retaining advisors, obtaining independent quotes for the Required Minimum Insurance Policies or performing its own assessment as to the impact of factors described in Sections 2.1(a) through (f) above and the amount of Excluded Premium Increases.
- 2.4 The initial benchmark amount of insurance premiums for the Required Minimum Insurance Policies shall be calculated and established as of the Final Acceptance Date based on the premium information obtained from the initial Insurance Review Report or, if the Department deems appropriate in its reasonable discretion, from information obtained pursuant to Section 2.3 above (“the **Starting Insurance Benchmarking Premiums**”).
- 2.5 The Starting Insurance Benchmarking Premiums shall be used in the benchmarking process for the remainder of the Term in accordance with the following procedures:
- (a) Sixty days prior to each renewal date thereafter (but no less than triennially), Developer shall provide the Insurance Review Report, with the information specified in Section 2.2 above. The Department shall determine the change in premium costs (disregarding any Excluded Premium Increases) on a coverage-by-coverage basis for the Required Minimum Insurance Policies calculated based on the information obtained from such Insurance Review Report or, if the Department deems appropriate in its reasonable discretion, from information obtained pursuant to Section 2.3 above.
 - (b) The Department will use the Starting Insurance Benchmarking Premiums to measure changes in premium costs at each renewal period (but no less than triennially) for each of the Required Minimum Insurance Policies. The Starting Insurance Benchmarking Premiums shall be escalated by applying a fixed 5.0% annual increase (“**Escalated Benchmark Insurance Premiums**”). Broker’s fees and agent’s commissions will not be considered as part of the benchmarking

exercise described in this Section 2, and are the exclusive responsibility of Developer.

- (c) Developer may voluntarily choose to procure an insurance package which exceeds the Required Minimum Insurance Policies in scope of coverage or limits, has more additional insureds, or has lower deductibles, in which case both Parties recognize that: (i) the actual variations in Developer's insurance premiums may not necessarily reflect the variations in the minimum insurance requirements and (ii) the Department will disregard the actual insurance package and will rely upon the analysis from the Insurance Review Report and its own independent analysis of the effect on the minimum insurance requirements. Any insurance beyond the Required Minimum Insurance Policies shall not be subject to the insurance benchmarking process and the Maximum Availability Payment adjustment described in Section 2.6 below.
- (d) If the Department, in its sole discretion, elects to retain its own insurance advisor to analyze the extent of eligible premium increases, Developer shall cooperate in good faith with any reasonable requests for additional information from the Department's insurance advisor. No later than 30 days after Developer's submission of the Insurance Review Report, the Department shall make its determination of the eligible premium increases subject to the Maximum Availability Payment adjustment described in Section 2.6 below. In the event of a dispute, the Department's determination shall be subject to the Dispute Resolution Procedures.

- 2.6 If the annual insurance premiums for the Actual Insurance Policies, as such premiums may be adjusted for Excluded Insurance Premiums and for reasons set forth in Section 5(c) above, are in excess of the applicable Escalated Benchmark Insurance Premiums, the Department shall increase the Maximum Availability Payment in an amount equal to [85%] of such premiums that are in excess of the applicable Escalated Benchmark Insurance Premiums until the next benchmarking period. If the annual insurance premiums for the Actual Insurance Policy, as such premiums may be adjusted pursuant subsection (c) of Section 17.1.2.13.4, are below the applicable Escalated Benchmark Insurance Premiums, the Department shall reduce the Maximum Availability Payment in an amount equal to [85%] of the difference between such premiums and the applicable Escalated Benchmark Insurance Premiums until the next benchmarking period.

Appendix

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10 Disputes

10-A Form of Disputes Review Board Agreement

10-B Disputes Review Board Procedures

UNDER DEVELOPMENT

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11 Initial Designation of Authorized Representatives

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12 Calculation and Payment of Refinancing Gain

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13 Terms and Conditions for Financing Competition

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14 Form of Direct Agreement

UNDER DEVELOPMENT

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15 Form of Letter of Credit

APPENDIX 15
FORM OF LETTER OF CREDIT

Appendix 15-A Form of Letter of Credit (Design Work – NTP 1)*
Appendix 15-B Form of Letter of Credit (D&C Work and Construction Period O&M Work –
 NTP 2)*

* If the letter of credit is to secure the payment or performance obligations of the Lead Engineering Firm or Lead Contractor rather than Developer, then:

- (1) Developer or the Collateral Agent shall be named as the beneficiary;
- (2) The letter of credit shall include provisions, in form and substance acceptable to the Department, expressly authorizing assignment and transfer of the beneficiary rights to the Department without condition or limitation and expressly permitting the Department to draw without presentation of the original letter of credit;
- (3) The letter of credit shall include provisions, in form and substance acceptable to the Department, naming the Department as automatic and exclusive transferee beneficiary upon Final Acceptance; and
- (4) The draw conditions in paragraph 2 of the form of letter of credit shall be revised to reflect a failure of the Contractor to make payments to subcontractors or other claimants or to perform its contract obligations under the Contract between Developer and such Contractor.

APPENDIX 15-A

FORM OF LETTER OF CREDIT

(DESIGN WORK – NTP1)

IRREVOCABLE STANDBY LETTER OF CREDIT

ISSUER: _____

PLACE FOR PRESENTATION OF DRAFT: _____

(Name and Address of Bank/Branch -- MUST be SAN FRANCISCO,
CALIFORNIA Bank/Branch)

APPLICANT:

BENEFICIARY: CALIFORNIA DEPARTMENT OF TRANSPORTATION
(Name and title of addressee)
(Street number)
(City, state, zip code)

LETTER OF CREDIT NUMBER: _____

PLACE AND DATE OF ISSUE: _____

AMOUNT: _____ **United States Dollars (US\$** _____ **)**

EXPIRATION DATE: _____

The Issuer hereby issues this Irrevocable Standby Letter of Credit in favor of the California Department of Transportation (the "Department"), for any sum or sums up to the aggregate amount of _____ **United States Dollars (US\$** _____ **)**, available by draft at sight drawn on the Issuer. Any draft under this Letter of Credit shall:

1. Identify this Irrevocable Standby Letter of Credit by the name of the Issuer, and the Letter of Credit number, amount, and place and date of issue; and
2. State one of the following:

"This drawing is due to the failure of _____ (Developer's name) _____ ("Developer") to make payments to contractors or other claimants or to perform certain obligations under an agreement _____ (include Permit #, Project # or Contract # as applicable) _____ between Developer and the Department (the "Agreement")."

or

"This drawing is due to the failure of Developer to deliver to the Department a new or replacement letter of credit, on the same terms, by the deadline set forth in the Agreement."

or

"This drawing is due to the fact that the Issuer does not meet the requirements set forth in the Agreement and Developer has failed to provide a substitute letter of credit issued by a qualified institution within the deadline set forth in the Agreement."

or

[Include another withdrawal conditions if established under agreement or applicable law].”

All drafts will be honored if presented to _____ (CALIFORNIA Bank/Branch - Name & Address) on or before _____ (Expiration Date) _____ or any extended expiration date.

Drawings by facsimile to facsimile number () _____ are acceptable (each such drawing, a "Fax Drawing") provided, however, that a Fax Drawing will not be effectively presented until Beneficiary confirms, by telephone, Issuer's receipt of such Fax Drawing by calling Issuer at telephone number () _____. Issuer will acknowledge Beneficiary's presentment by e-mail to the e-mail address provided to Issuer in the Fax Drawing.

This Letter of Credit shall be automatically extended for successive periods of one year, without amendment, from the stated expiration date and each extended expiration date unless we send the Department written notice of our intent not to extend the credit; which notice must be sent at least 30 days prior to the expiration date of the original term hereof or any extended one year term, by registered or certified mail or overnight courier, to the Comptroller of the California Department of Transportation at the _____ (Addressee's office name, street name, city, state, zip code) _____, or any other address specified in writing to the Issuer at the above address by the (addressee's title) _____.

This Letter of Credit is subject to the rules of the "International Standby Practices" ISP98. If a conflict between ISP98 and California law should arise, California law shall prevail.

Issuer:

By: _____ (Authorized signature of Issuer)

APPENDIX 15-B

FORM OF LETTER OF CREDIT

(D&C WORK, CONSTRUCTION PERIOD O&M WORK – NTP2)

IRREVOCABLE STANDBY LETTER OF CREDIT

ISSUER: _____

PLACE FOR PRESENTATION OF DRAFT: _____

(Name and Address of Bank/Branch -- MUST be SAN FRANCISCO,
CALIFORNIA Bank/Branch)

APPLICANT:

BENEFICIARY: CALIFORNIA DEPARTMENT OF TRANSPORTATION
(Name and title of addressee)
(Street number)
(City, state, zip code)

LETTER OF CREDIT NUMBER: _____

PLACE AND DATE OF ISSUE: _____

AMOUNT: _____ **United States Dollars (US\$** _____ **)**

EXPIRATION DATE: _____

The Issuer hereby issues this Irrevocable Standby Letter of Credit in favor of the California Department of Transportation (the "Department"), for any sum or sums up to the aggregate amount of _____ **United States Dollars (US\$** _____ **)**, available by draft at sight drawn on the Issuer. Any draft under this Letter of Credit shall:

1. Identify this Irrevocable Standby Letter of Credit by the name of the Issuer, and the Letter of Credit number, amount, and place and date of issue; and

2. State one of the following:

"This drawing is due to the failure of _____ (Developer's name) _____ ("Developer") to make payments to contractors or other claimants or to perform certain obligations under an agreement _____ (include Permit #, Project # or Contract # as applicable) _____ between Developer and the Department (the "Agreement")."

or

"This drawing is due to the failure of Developer to deliver to the Department a new or replacement letter of credit, on the same terms, by the deadline set forth in the Agreement."

or

"This drawing is due to the fact that the Issuer does not meet the requirements set forth in the Agreement and Developer has failed to provide a substitute letter of credit issued by a qualified institution within the deadline set forth in the Agreement."

or

[Include another withdrawal conditions if established under agreement or applicable law].”

All drafts will be honored if presented to _____ (CALIFORNIA Bank/Branch - Name & Address) on or before _____ (Expiration Date) _____ or any extended expiration date.

Drawings by facsimile to facsimile number () _____ are acceptable (each such drawing, a "Fax Drawing") provided, however, that a Fax Drawing will not be effectively presented until Beneficiary confirms, by telephone, Issuer's receipt of such Fax Drawing by calling Issuer at telephone number () _____. Issuer will acknowledge Beneficiary's presentment by e-mail to the e-mail address provided to Issuer in the Fax Drawing.

This Letter of Credit shall be automatically extended for successive periods of one year, without amendment, from the stated expiration date and each extended expiration date unless we send the Department written notice of our intent not to extend the credit; which notice must be sent at least 30 days prior to the expiration date of the original term hereof or any extended one year term, by registered or certified mail or overnight courier, to the Comptroller of the California Department of Transportation at the _____ (Addressee's office name, street name, city, state, zip code) _____, or any other address specified in writing to the Issuer at the above address by the (addressee's title) _____.

This Letter of Credit is subject to the rules of the "International Standby Practices" ISP98. If a conflict between ISP98 and California law should arise, California law shall prevail.

Issuer:

By: _____ (Authorized signature of Issuer) _____

Appendix

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16 Form of Performance Security and Payment Security

APPENDIX 16

FORMS OF PERFORMANCE BOND, PAYMENT BOND AND MULTIPLE OBLIGEE RIDER

Appendix 16-A.1	Form of Performance Bond (Design Work– NTP 1)*
Appendix 16-A.2	Form of Performance Bond (D&C Work – NTP 2)*
Appendix 16-B.1	Form of Payment Bond (Design Work – NTP 1)*
Appendix 16-B.2	Form of Payment Bond (D&C Work – NTP 2)*
Appendix 16-C	Form of Multiple Obligee Rider for Performance Bond**
Appendix 16-D	Form of Multiple Obligee Rider for Payment Bond**

*If the bond is to secure the payment or performance obligations of Developer rather than a Key Contractor, then the form of bond shall be revised to reflect Developer as the “Principal” or “Contractor”, Department in place of Developer as the bond obligee, and this Agreement as the “Contract”.

** If the bond is to secure the payment or performance obligations of Developer rather than a Key Contractor, then the form of multiple obligee rider shall be revised to reflect the Department as the “Primary Obligee” and the Collateral Agent as the “Additional Obligee”.

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

APPENDIX 16-A.1**FORM OF PERFORMANCE BOND (DESIGN WORK – NTP 1)**

Contract No. _____

Bond No. _____

KNOW ALL MEN BY THESE PRESENTS,

THAT WHEREAS, the California Department of Transportation (the “Department”) has awarded _____ to _____ (the “Developer” or “Obligee”), a Public-Private Partnership Agreement (the “Agreement”) to develop, design, construct, finance, operate and maintain _____ (the “Project”) through a public-private partnership, as authorized under Section 143 of the Streets and Highways Code;

AND WHEREAS, _____ [Design-Build Contractor Name] an entity duly authorized to do business in the State of California and having its principal place of business at _____ [Street Address, City, State, Zip and Phone #] (the “Principal” or “Contractor”) has entered into a contract (the “Contract”) with Developer bearing the date of _____, related to the performance of design and engineering services necessary to enable the Developer to obtain NTP 2 under the Agreement, which Contract is specifically incorporated by reference herein;

AND WHEREAS, it is one of the conditions of the Contract and the Agreement that these presents shall be executed;

NOW THEREFORE, We the undersigned Principal and _____ (the “Surety” or “Co-Sureties”) are held and firmly bound unto the Obligee, in the sum of _____ United States Dollars (\$US _____), to be paid to the Obligee for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

1. THE CONDITION OF THIS OBLIGATION IS SUCH THAT if the above bound Principal, or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by and well and truly keep and perform the covenants, conditions, and agreements in the Contract, including any and all amendments, supplements, and alterations made to the Contract as therein provided, on the Principal's part to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the Obligee, its directors, officers and agents, as therein stipulated, then this obligation shall become and be null and void; otherwise, it shall be and remain in full force and virtue.

2. [Note: The following provision is optional. The reduction in liability to the Surety or Co-Sureties that results from this provision would increase Caltrans' risk exposure, but would probably reduce the cost of the bond. The decision whether to include this provision or not should be a business decision and, therefore, should be made by Caltrans with input from counsel.] This Bond shall cover the cost to complete the

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

development, design, construction, financing, operations and maintenance work (the "Work"), but shall not cover any damages of the type specified to be covered by the Principal's errors and omissions insurance for the design elements of the Work required pursuant to the Contract or by any professional liability insurance, whether or not such insurance is provided in an amount sufficient to cover such damages.

3. The obligations covered by this Bond specifically include liability for liquidated damages and warranties as specified in the Contract, but not to exceed the bonded sum.

4. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any rescission or attempted rescission of the Contract, or this Bond, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of an Obligor entitled to recover under this Bond, or any fraud practiced by any other person other than an Obligor seeking to recover from this Bond, shall in any way affect the obligations of the Surety (or Co-Sureties) on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications. The Surety (or Co-Sureties) agree(s) that payments made to contractors and suppliers to satisfy claims on the payment bond do not reduce the Surety's legal obligations under this Bond. Payments made to contractors or suppliers under any agreement where the Surety has arranged for completion of the work to satisfy this Bond will not be considered payment bond claims.

4. Whenever the Principal shall be, and is declared by the Developer to be, in default under the Contract, provided that the Developer is not then in material default thereunder, the Surety (or Co-Sureties) shall promptly:

(a) remedy such default, or

(b) complete the project in accordance with the terms and conditions of the Contract then in effect, or

(c) select a contractor or contractors to complete all work under the Contract for which a notice to proceed has been issued in accordance with the terms and conditions of the Contract then in effect, using a contractor or contractors approved by the Department as required by the Agreement, arrange for a contract meeting the requirements of the Agreement between such contractor or contractors and the Developer, and make available as work progresses (even though there should be a default or a succession of defaults under such contract or contracts of completion arranged under this paragraph), sufficient funds to pay the cost of completion less the unpaid balance of the contract price; but not exceeding, including other costs and damages for which Surety (or Co-Sureties) is (are) liable hereunder, the bonded sum.

5. **[Use in case of multiple or co-sureties]** The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligor will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligor to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The Co-Sureties also agree to designate a single agent

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

for service of process with respect to any actions on this Bond, which agent shall either be (a) a natural person or (b) a corporation qualified to act as an agent for service of process under Section 1505 of the Corporations Code. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative and/or agent, signed by all of the Co-Sureties. The initial representative shall be _____, and the initial agent for service of process shall be _____.

IN WITNESS WHEREOF, We have hereunto set our hands and seals on this ____ day of _____ 20____.

Correspondence or claims relating to this Bond should be sent to the Surety (or Sureties) at the following address:

[Note: If more than one surety, then add Appropriate number of lines to signature block.]

(Principal's name, title, and signature)

Surety

By: _____

Attorney-in-Fact

NOTE: Signatures of those executing for the Surety (or Co-Sureties) must be properly acknowledged, and a Power of Attorney attached.

ADA Notice: For individuals with sensory disabilities, this document may be available in alternate formats. For information call (916) 654-6410 or TDD (916) 654-3880 or write Records and Forms Management, 1120 N Street, MS-89, Sacramento, CA 95814.

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

CALIFORNIA ALL PURPOSE ACKNOWLEDGEMENT

State of _____

County of _____

On this ____ day of _____ in the year of _____ before me, a notary public in and for the county and state aforesaid, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____ (SEAL) _____

Signature of Notary Public

CALIFORNIA ALL PURPOSE ACKNOWLEDGEMENT

State of _____

County of _____

On this ____ day of _____ in the year of _____ before me, a notary public in and for the county and state aforesaid, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____ (SEAL) _____

Signature of Notary Public

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

APPENDIX 16-A.2
FORM OF PERFORMANCE BOND (D&C WORK – NTP 2)Contract No. _____
Bond No. _____**KNOW ALL MEN BY THESE PRESENTS,**

THAT WHEREAS, the California Department of Transportation (the “Department”) has awarded _____ to _____ (the “Developer” or “Obligee”), a Public-Private Partnership Agreement (the “Agreement”) to develop, _____ design, _____ construct, _____ finance, _____ operate and _____ maintain _____ (the “Project”) through a public-private partnership, as authorized under Section 143 of the Streets and Highways Code;

AND WHEREAS, _____ [Design-Build Contractor Name] an entity duly authorized to do business in the State of California and having its principal place of business at _____ [Street Address, City, State, Zip and Phone #] (the “Principal” or “Contractor”) has entered into a contract (the “Contract”) with Developer bearing the date of _____, related to the performance of design, construction, operations and maintenance work for the Project, which Contract is specifically incorporated by reference herein;

AND WHEREAS, it is one of the conditions of the Contract and the Agreement that these presents shall be executed;

NOW THEREFORE, We the undersigned Principal and _____ (the “Surety” or “Co-Sureties”) are held and firmly bound unto the Obligee, in the sum of _____ United States Dollars (\$US _____), to be paid to the Obligee for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

1. THE CONDITION OF THIS OBLIGATION IS SUCH THAT if the above bound Principal, or its heirs, executors, administrators, successors or assigns, shall in all things stand to and abide by and well and truly keep and perform the covenants, conditions, and agreements in the Contract, including any and all amendments, supplements, and alterations made to the Contract as therein provided, on the Principal's part to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meaning, and shall indemnify and save harmless the Obligee, its directors, officers and agents, as therein stipulated, then this obligation shall become and be null and void; otherwise, it shall be and remain in full force and virtue.

2. [Note: The following provision is optional. The reduction in liability to the Surety or Co-Sureties that results from this provision would increase Caltrans' risk exposure, but would probably reduce the cost of the bond. The decision whether to include this provision or not should be a business decision and, therefore, should be made by Caltrans with input from counsel.] This Bond shall cover the cost to complete the development, design, construction, financing, operations and maintenance work (the “Work”),

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

but shall not cover any damages of the type specified to be covered by the Principal's errors and omissions insurance for the design elements of the Work required pursuant to the Contract or by any professional liability insurance, whether or not such insurance is provided in an amount sufficient to cover such damages.

3. The obligations covered by this Bond specifically include liability for liquidated damages and warranties as specified in the Contract, but not to exceed the bonded sum.

4. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any rescission or attempted rescission of the Contract, or this Bond, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of an Obligor entitled to recover under this Bond, or any fraud practiced by any other person other than an Obligor seeking to recover from this Bond, shall in any way affect the obligations of the Surety (or Co-Sureties) on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications. The Surety (or Co-Sureties) agree(s) that payments made to contractors and suppliers to satisfy claims on the payment bond do not reduce the Surety's legal obligations under this Bond. Payments made to contractors or suppliers under any agreement where the Surety has arranged for completion of the work to satisfy this Bond will not be considered payment bond claims.

4. Whenever the Principal shall be, and is declared by the Developer to be, in default under the Contract, provided that the Developer is not then in material default thereunder, the Surety (or Co-Sureties) shall promptly:

(a) remedy such default, or

(b) complete the project in accordance with the terms and conditions of the Contract then in effect, or

(c) select a contractor or contractors to complete all work under the Contract for which a notice to proceed has been issued in accordance with the terms and conditions of the Contract then in effect, using a contractor or contractors approved by the Department as required by the Agreement (provided, however, that the Surety may not select the Principal or any affiliate of the Principal to complete the work for and on behalf of the Surety without the Developer's express written consent), arrange for a contract meeting the requirements of the Agreement between such contractor or contractors and the Developer, and make available as work progresses (even though there should be a default or a succession of defaults under such contract or contracts of completion arranged under this paragraph), sufficient funds to pay the cost of completion less the unpaid balance of the contract price; but not exceeding, including other costs and damages for which Surety (or Co-Sureties) is (are) liable hereunder, the bonded sum;.

5. [Use in case of multiple or co-sureties] The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligor will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligor to the Co-Sureties and all claims under this Bond shall be

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

sent to such designated representative. The Co-Sureties also agree to designate a single agent for service of process with respect to any actions on this Bond, which agent shall either be (a) a natural person or (b) a corporation qualified to act as an agent for service of process under Section 1505 of the Corporations Code. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligor designating a single new representative and/or agent, signed by all of the Co-Sureties. The initial representative shall be _____, and the initial agent for service of process shall be _____.

IN WITNESS WHEREOF, We have hereunto set our hands and seals on this ____ day of _____ 20____.

Correspondence or claims relating to this Bond should be sent to the Surety (or Sureties) at the following address:

**[Note: If more than one surety, then add
Appropriate number of lines to signature
block.]**

(Principal's name, title, and signature)

Surety

By: _____

Attorney-in-Fact

NOTE: Signatures of those executing for the Surety (or Co-Sureties) must be properly acknowledged, and a Power of Attorney attached.

ADA Notice: For individuals with sensory disabilities, this document may be available in alternate formats. For information call (916) 654-6410 or TDD (916) 654-3880 or write Records and Forms Management, 1120 N Street, MS-89, Sacramento, CA 95814.

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

CALIFORNIA ALL PURPOSE ACKNOWLEDGEMENT

State of _____

County of _____

On this ____ day of _____ in the year of _____ before me, a notary public in and for the county and state aforesaid, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____ (SEAL) _____

Signature of Notary Public

CALIFORNIA ALL PURPOSE ACKNOWLEDGEMENT

State of _____

County of _____

On this ____ day of _____ in the year of _____ before me, a notary public in and for the county and state aforesaid, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____ (SEAL) _____

Signature of Notary Public

PAYMENT BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

APPENDIX 16-B.1
FORM OF PAYMENT BOND (DESIGN WORK – NTP 1)

Contract No. _____
Bond No. _____

KNOW ALL MEN BY THESE PRESENTS,

THAT WHEREAS, The California Department of Transportation has awarded to _____ (the "Developer" or "Obligee"), a Public-Private Partnership Agreement (the "Agreement") to develop, design, construct, finance, operate and maintain _____ (the "Project") through a public-private partnership, as authorized under Section 143 of the Streets and Highways Code;

AND WHEREAS, _____ [Design-Build Contractor Name] an entity duly authorized to do business in the State of California and having its principal place of business at _____ [Street Address, City, State, Zip and Phone #] (the "Principal" or "Contractor") has entered into a contract (the "Contract") with Developer bearing the date of _____, related to the performance of design and engineering services necessary to enable the Developer to obtain NTP 2 under the Agreement, which Contract is specifically incorporated by reference herein;

AND WHEREAS, it is one of the conditions of the Contract and the Agreement that these presents shall be executed;

NOW THEREFORE, We the undersigned Principal and _____ (the "Surety" or "Co-Sureties") are held and firmly bound unto the Obligee, in the sum of _____ United States Dollars (\$US _____), to be paid to the Obligee for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

1. THE CONDITION OF THIS OBLIGATION IS SUCH THAT if said Principal, or its heirs, executors, administrators successors or assigns or subcontractors, shall fail to pay:

- (a) any of the persons named in California Civil Code Section 3181 involved in prosecution of the design and engineering services, as provided for in the Contract, or
- (b) any amounts required to be deducted, withheld, and paid over to the Employment Development Department from wages of employees of the Principal and subcontractors pursuant to Section 13020 of the Unemployment Insurance Code with respect to work or labor performed under the Contract or subcontracts, or
- (c) any amounts required to be deducted, withheld, and paid over to the Franchise Tax Board from the wages of employees of the Principal and its subcontractors pursuant to Revenue and Taxation Code Section 18662 et seq. with respect to such work and labor, or
- (d) anyone required to be paid by law

PAYMENT BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

then the Surety (or Co-Sureties) herein shall pay for the same, in an aggregate amount not exceeding the sum specified in this Bond, otherwise the above obligation shall be null and void. In case suit is brought upon this Bond, the Surety (or Co-Sureties) will pay reasonable attorney's fee to be fixed by the court.

2. This Bond shall inure to the benefit of any of the persons named in Civil Code Section 3181 or anyone required to be paid by law under the Contract so as to give a right of action to such persons or their assigns in any suit brought upon this Bond.

3. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any rescission or attempted rescission of the Contract, or this Bond, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

4. This Bond shall cover all payment obligations under the Contract.

5. [Use in case of multiple or co-sureties] The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligee and claimants will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligee or claimants to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The Co-Sureties also agree to designate a single agent for service of process with respect to any actions on this Bond, which agent shall either be (a) a natural person, or (b) a corporation qualified to act as an agent for service of process under Corporations Code Section 1505. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative and/or agent, signed by all of the Co-Sureties. The initial representative shall be _____, and the initial agent for service of process shall be _____."

In Witness Whereof, We have hereunto set our hands and seals on this _____ day of _____.

PAYMENT BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

Correspondence or claims relating to this Bond should be sent to the Surety (or Sureties) at the following address:

**[Note: If more than one surety, then add
Appropriate number of lines to signature
block.]**

(Principal's name, title, and signature)

Surety

By: _____

Attorney-in-Fact

NOTE: Signatures of those executing for the Surety (or Co-Sureties) must be properly acknowledged, and a Power of Attorney attached.

ADA Notice: For individuals with sensory disabilities, this document may be available in alternate formats. For information call (916) 654-6410 or TDD (916) 654-3880 or write Records and Forms Management, 1120 N Street, MS-89, Sacramento, CA 95814.

CALIFORNIA ALL PURPOSE ACKNOWLEDGEMENT

State of _____

County of _____

On this ____ day of _____ in the year of _____ before me, a notary public in and for the county and state aforesaid, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____(SEAL)_____

Signature of Notary Public

PAYMENT BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

CALIFORNIA ALL PURPOSE ACKNOWLEDGEMENT

State of _____

County of _____

On this ____ day of _____ in the year of _____ before me, a notary public in and for the county and state aforesaid, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____ (SEAL) _____

Signature of Notary Public

PAYMENT BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

APPENDIX 16-B.2
FORM OF PAYMENT BOND (D&C WORK – NTP 2)

Contract No. _____
Bond No. _____

KNOW ALL MEN BY THESE PRESENTS,

THAT WHEREAS, The California Department of Transportation has awarded to _____ (the “Developer” or “Obligee”), a Public-Private Partnership Agreement (the “Agreement”) to develop, design, construct, finance, operate and maintain _____ (the “Project”) through a public-private partnership, as authorized under Section 143 of the Streets and Highways Code;

AND WHEREAS, _____ [Design-Build Contractor Name] an entity duly authorized to do business in the State of California and having its principal place of business at _____ [Street Address, City, State, Zip and Phone #] (the “Principal” or “Contractor”) has entered into a contract (the “Contract”) with Developer bearing the date of _____, related to the performance of design, construction, operations and maintenance work for the Project, which Contract is specifically incorporated by reference herein;

AND WHEREAS, it is one of the conditions of the Contract and the Agreement that these presents shall be executed;

NOW THEREFORE, We the undersigned Principal and _____ (the “Surety” or “Co-Sureties”) are held and firmly bound unto the Obligee, in the sum of _____ United States Dollars (\$US _____), to be paid to the Obligee for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

1. THE CONDITION OF THIS OBLIGATION IS SUCH THAT if said Principal, or its heirs, executors, administrators successors or assigns or subcontractors, shall fail to pay:

- (a) any of the persons named in California Civil Code Section 3181 involved in prosecution of the design and engineering services, as provided for in the Contract, or
- (b) any amounts required to be deducted, withheld, and paid over to the Employment Development Department from wages of employees of the Principal and subcontractors pursuant to Section 13020 of the Unemployment Insurance Code with respect to work or labor performed under the Contract or subcontracts, or
- (c) any amounts required to be deducted, withheld, and paid over to the Franchise Tax Board from the wages of employees of the Principal and its subcontractors pursuant to Revenue and Taxation Code Section 18662 et seq. with respect to such work and labor, or

PAYMENT BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

then the Surety (or Co-Sureties) herein shall pay for the same, in an aggregate amount not exceeding the sum specified in this Bond, otherwise the above obligation shall be null and void. In case suit is brought upon this Bond, the Surety (or Co-Sureties) will pay reasonable attorney's fee to be fixed by the court.

2. This Bond shall inure to the benefit of any of the persons named in Civil Code Section 3181 or anyone required to be paid by law under the Contract so as to give a right of action to such persons or their assigns in any suit brought upon this Bond.

3. The Surety (or Co-Sureties) agree(s) that no change, extension of time, alterations, additions, omissions or other modifications of the terms of the Contract, or in the work to be performed with respect to the Project, or in the specifications or plans, or any change or modification of any terms of payment or extension of time for any payment pertaining or relating to the Contract, or any rescission or attempted rescission of the Contract, or this Bond, or any conditions precedent or subsequent in this Bond attempting to limit the right of recovery of claimants otherwise entitled to recover under this Bond, or any fraud practiced by any other person other than the claimant seeking to recover this Bond, shall in any way affect its obligations on this Bond, and it does hereby waive notice of such changes, extension of time, alterations, additions, omissions or other modifications.

4. This Bond shall cover all payment obligations under the Contract.

5. [Use in case of multiple or co-sureties] The Co-Sureties agree to empower a single representative with authority to act on behalf of all of the Co-Sureties with respect to this Bond, so that the Obligee and claimants will have no obligation to deal with multiple sureties hereunder. All correspondence from the Obligee or claimants to the Co-Sureties and all claims under this Bond shall be sent to such designated representative. The Co-Sureties also agree to designate a single agent for service of process with respect to any actions on this Bond, which agent shall either be (a) a natural person, or (b) a corporation qualified to act as an agent for service of process under Corporations Code Section 1505. The designated representative and agent for service of process may be changed only by delivery of written notice (by personal delivery or by certified mail, return receipt requested) to the Obligee designating a single new representative and/or agent, signed by all of the Co-Sureties. The initial representative shall be _____, and the initial agent for service of process shall be _____."

In Witness Whereof, We have hereunto set our hands and seals on this _____ day of _____.

PAYMENT BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

Correspondence or claims relating to this Bond should be sent to the Surety (or Sureties) at the following address:

**[Note: If more than one surety, then add
Appropriate number of lines to signature
block.]**

(Principal's name, title, and signature)

Surety

By: _____

Attorney-in-Fact

NOTE: Signatures of those executing for the Surety (or Co-Sureties) must be properly acknowledged, and a Power of Attorney attached.

ADA Notice: For individuals with sensory disabilities, this document may be available in alternate formats. For information call (916) 654-6410 or TDD (916) 654-3880 or write Records and Forms Management, 1120 N Street, MS-89, Sacramento, CA 95814.

CALIFORNIA ALL PURPOSE ACKNOWLEDGEMENT

State of _____

County of _____

On this ____ day of _____ in the year of _____ before me, a notary public in and for the county and state aforesaid, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____(SEAL)_____

Signature of Notary Public

PAYMENT BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

CALIFORNIA ALL PURPOSE ACKNOWLEDGEMENT

State of _____

County of _____

On this ____ day of _____ in the year of _____ before me, a notary public in and for the county and state aforesaid, personally appeared _____ who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to within the instrument and acknowledged to me that he/she executed the same in his/her authorized capacity(ies), and that by his/her signature(s) on the instrument, the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal:

_____ (SEAL) _____

Signature of Notary Public

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

APPENDIX 16-C

FORM OF MULTIPLE OBLIGEE RIDER

(Performance Bond)

MULTIPLE OBLIGEE RIDER

This Rider is executed concurrently with and shall be attached to and form a part of Performance Bond No. _____.

WHEREAS, on or about the _____ day of _____, 20____, _____, (hereinafter called the "Principal"), entered into a written agreement bearing the date of _____, 20____ (hereinafter called the "Contract") with _____, (hereinafter called the "Primary Obligees") for the performance of [design and engineering services] [design, construction, operations and maintenance] for the Presidio Parkway project in the City and County of San Francisco; and

WHEREAS, the Primary Obligees requires that Principal provide a performance bond and that the California Department of Transportation (the "Department"), _____ and _____ be named as additional obligees under the performance bond; and

WHEREAS, Principal and the Surety have agreed to execute and deliver this Rider concurrently with the execution of Performance Bond No. _____ (hereinafter referred to as "Performance Bond") upon the conditions herein stated.

NOW, THEREFORE, the undersigned hereby agree and stipulate as follows:

The Department, _____, and _____ are hereby added to the Performance Bond as named obligees (hereinafter referred to as "Additional Obligees").

The Surety shall not be liable under the Performance Bond to the Primary Obligees, the Additional Obligees, or any of them, unless the Primary Obligees, the Additional Obligees, or any of them, shall make payments to the Principal (or in the case the Surety arranges for completion of the Contract, to the Surety) in accordance with the terms of the Contract as to payments and shall perform all other obligations to be performed under the Contract in all material respects at the time and in the manner therein set forth such that no material default by the Primary Obligees shall have occurred and be continuing under the Contract.

The aggregate liability of the Surety under this Performance Bond, to any or all of the obligees, as their interests may appear, is limited to the penal sum of the Performance Bond. The Additional Obligees' rights hereunder are subject to the same defenses Principal and/or Surety have against the Primary Obligees, provided that the Additional Obligees have received notice and [30] days prior opportunity to cure breach or default by the Primary Obligees under the Contract. The total liability of the Surety shall in no event exceed the amount recoverable from the Principal by the Primary Obligees under the Contract.

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

The Surety may, at its option, make any payments under the Performance Bond by check issued jointly to all of the obligees.

In the event of a conflict between the Performance Bond and this Rider, this Rider shall govern and control. All references to the Performance Bond, either in the Performance Bond or in this Rider, shall include and refer to the Performance Bond as supplemented and amended by this Rider. Except as herein modified, the Performance Bond shall be and remains in full force and effect.

Signed, sealed and dated this _____ day of _____, 20_____.

(Principal)
(Seal)

By: _____

(Title)

(Surety)
(Seal)

By: _____

, Attorney-in-Fact

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

APPENDIX 16-D

FORM OF MULTIPLE OBLIGEE RIDER

(Payment Bond)

MULTIPLE OBLIGEE RIDER

This Rider is executed concurrently with and shall be attached to and form a part of Payment Bond No. _____.

WHEREAS, on or about the ____ day of _____, 20____, _____, (hereinafter called the "Principal"), entered into a written agreement bearing the date of _____, 20____ hereinafter called the "Contract") with _____, (hereinafter called the "Primary Obligee") for the performance of [design and engineering services] [design, construction, operations and maintenance] for the Presidio Parkway project in the City and County of San Francisco; and

WHEREAS, the Primary Obligee requires that Principal provide a payment bond and that the California Department of Transportation (the "Department"), _____ and _____ be named as additional obligees under the payment bond; and

WHEREAS, Principal and the Surety have agreed to execute and deliver this Rider concurrently with the execution of Payment Bond No. _____ (hereinafter referred to as "Payment Bond") upon the conditions herein stated.

NOW, THEREFORE, the undersigned hereby agree and stipulate as follows:

The Department and _____, and _____ are hereby added to the Payment Bond as named obligees (hereinafter referred to as "Additional Obligees").

The aggregate liability of the Surety under this Payment Bond, to any or all of the obligees, as their interests may appear, is limited to the penal sum of the Payment Bond. The Additional Obligees' rights hereunder are subject to the same defenses Principal and/or Surety have against the Primary Obligee, provided that the Additional Obligees have received notice and [30] days prior opportunity to cure breach or default by the Primary Obligee under the Contract.

The Surety may, at its option, make any payments under the Payment Bond by check issued jointly to all of the obligees.

In the event of a conflict between the Payment Bond and this Rider, this Rider shall govern and control. All references to the Payment Bond, either in the Payment Bond or in this Rider, shall include and refer to the Payment Bond as supplemented and amended by this Rider. Except as herein modified, the Payment Bond shall be and remains in full force and effect.

PERFORMANCE BOND FOR PUBLIC-PRIVATE PARTNERSHIP AGREEMENTS

(To Accompany a Public-Private Partnership Agreement)

Signed, sealed and dated this ____ day of _____, 20__.

(Principal)
(Seal)

By: _____

(Title)

(Surety)
(Seal)

By: _____

, Attorney-in-Fact

Appendix

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17 [Reserved]

Appendix

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18 UDBE/DBE Affirmative Action Program Plan

UNDER DEVELOPMENT

Appendix

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19 California Labor Code Requirements

UNDER DEVELOPMENT

Appendix

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20 Federal Requirements

UNDER DEVELOPMENT

Appendix

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21 List of Major Permits

UNDER DEVELOPMENT

Appendix

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22 Format for Baseline Report for Phase I Construction

UNDER DEVELOPMENT